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RAWLS AND RIGGED CONTRACTS

by

DAVID JENNEX

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH

IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled RAWLS AND RIGGED CONTRACTS submitted by David Joseph Jennex in partial fulfilment of the requirements for the degree of Master of Arts.

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Mohan Matthen

Date: December 5, 1986

This thesis is dedicated to Nellie Bonds, who, as always, was there when I needed her.

ABSTRACT

In a recent article Norman Daniels contends that the conditions that Rawls invokes to justify the contractual circumstances of the original position should be interpreted as a deep theory from which the principles of justice are to be derived. He then argues that since some of the statements constituting the deep theory in question may incorporate moral notions, the theory theory must be acceptable on grounds independent of our considered moral judgments. In this thesis I examine and develop Daniels' notion of an independence constraint so as to apply it to the portion of Rawls' deep theory represented by his reasoning for the veil of ignorance.

In chapter one I introduce the notion that Rawls' reasoning for his construal of the original position can profitably be interpreted as a deep theory. I then examine Daniels' arguments for subjecting the moral portion of such a deep theory to an independence constraint. I conclude that since the bulk of the justification for the circumstances of the original contractors must be provided by the moral aspect of Rawls' deep theory, such an independence constraint is required.

In chapter two I examine in detail Daniels' suggestion as to a suitable independence constraint. I argue that his formulation, though illuminating, is inadequate to ensuring

the validity of Rawls' principles of justice, and offer a revised formulation which I argue more fully demonstrates the comprehensive nature of Rawls' justificatory scheme and provides the proper standpoint from which to assess his deep theory.

In chapter three I argue that Rawls' reasoning for the veil of ignorance violates the independence constraint. I do this in two ways. First, I show that the justification for the veil is in all relevant respects identical to Rawls' general conception of justice. Secondly, I argue that in view of the highly abstract nature of Rawls' deep theory its component statements cannot make reference to empirically identifiable states-of-affairs. I then show that Rawls' reasoning for the veil makes just such a reference and therefore violates the independence constraint.

In my concluding remarks I offer an explanation of how Rawls could have been led into violating the independence constraint. I suggest that there is a tension in his meta-ethics between his contractarian sympathies and the "scientific" approach to ethical building engendered in the account of the process of reflective equilibrium that increases the liklihood that he will have incorporated statements in his deep theory that make reference to empirically isolatable states-of-affairs.

ACKNOWLEDGMENTS

I would like to thank Robert Bright for allowing me to use him as a philosophical sounding board for a great portion of this thesis. It is not an understatement to say that without his help (not to mention the use of his computer) I would not have finished it.

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RAWLS AND RIGGED CONTRACTS

Since Ancient Roman times the notion of the social contract has held a prominent place in Western political theory. Traditionally, it has been used as a means of justifying or explaining the authority of the state, as opposed to a method of dealing with substantive problems of distributive justice or social policy. The basic intuitive idea common to all contract theories is that political sovereignty ultimately resides in the individual, and that therefore the state is best understood as the result of a collective agreement or contract between its citizens. In discussions of this notion the question naturally arises as to whether actual political contracts have ever taken place, and, further, whether they are necessary to the plausibility of contract theory itself. The answer to the first question is that, historically, few political associations have been created by an act of contract, the exceptions primarily consisting in fedarations that have been enacted after a people has gained independence from a parent nation. However, if political society is understood as embodying an agreement between its members this need not imply that an actual contract ever took place. Rather, contract theory may be understood as hypothetical in nature, construing the circumstances of an imaginary contract so that they abstract from aspects of the human condition thought relevant. The purported results of such a contract may then be used to criticize existing societal arrangements or to suggest new directions for society to take.[1]

In recent times the hypothetical model of contractarian political theory has found its most prominent example in the work of John Rawls. In *A Theory of Justice*[2] Rawls claims to have carried to a higher level of abstraction the theory of the social contract found in the works of Locke, Rousseau, and Kant [11]. The specific problem to which he applies his theory is that of identifying the principles of justice that are to regulate the "basic structure of society". The basic structure consists of the major social institutions that control the distribution of fundamental rights and economic advantages [7]. Rawls contends that the basic structure should be the primary subject of the theory of justice in virtue of the profound effect it has on the social positions that people inherit. Since people born into different positions may have entirely different life expectations the basic structure can be seen as favouring certain "starting places" over others. It is to such pervasive inequalities that Rawls believes the principles of justice must above all apply [7].

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[1] Despite various statements about the history of mankind employed by virtually all of the great contract thinkers, their theories have been plausibly interpreted as essentially hypothetical in nature. For example, see C. B. Macpherson, *Political Theory of Possessive Individualism: Hobbes to Locke*. (Oxford: Clarendon Press, 1962).

[2] John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belnap Press, Harvard University, 1971). Page number references to Rawls' book in the main text of this essay will appear in brackets. References made in footnotes will begin with *TJ*, followed by the appropriate page number(s).

Returning to the hypothetical nature of Rawls' contractarian theory, we may here note the most salient features of his argument. Rawls contends that if a number of rational self-interested individuals are situated with respect to each other in a manner which renders any agreements made by them fair, that fairness will transfer to the principles of justice they would collectively choose.[3] The conditions that he thinks will guarantee a fair agreement together constitute what he refers to as "the original position", which is meant to correspond to the state of nature in traditional contract theories. In the original position the contracting parties have no knowledge of what kind of society they live in, what natural abilities and endowments they might have, or even what psychological propensities or individual conceptions of the good they might harbour. Rather, their knowledge is for the most part restricted to a very general sort, such as of natural and social scientific theory. The intuition that the above conditions guarantee that a set of fair principles of justice will be chosen underlies the particular conception of justice that Rawls labels "justice as fairness".

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[3] This idea is dependent upon Rawls' theory of procedural justice. See TJ, 85f.

We might well wonder why we should feel compelled to obey principles of justice agreed upon by people under such circumstances. Why should such a hypothetical contract have any bearing on our moral lives? There seem to be two answers to this question in Rawls' book, which as we shall see are intimately related. The first is that the principles of justice chosen in the original position match a definite if limited class of moral facts, namely, our considered moral judgments in "reflective equilibrium". Reflective equilibrium is the process whereby we try and fit our most firmly held convictions concerning the justness and unjustness of certain practices with a coherent set of principles. This matching or fitting process, however, does not presuppose that our considered moral judgments are coherent enough to admit of comprehensive systematization. Even those judgments made under the most favourable conditions[4] are likely subject to inconsistencies. In this event the proposed principles of justice play an adjudicating role. Presumably, after we have identified a set of principles that provides grounds for a significant portion or our considered moral judgments we will be persuaded that some of our recalcitrant judgments -- i.e., some of those that cannot be subsumed under the proposed principles -- are inappropriate. This is especially likely if we can locate cultural or psychological biases to explain the recalicitrant judgments, and if the favoured principles yield new judgments which we find we can now accept. Indeed, it is one of the primary functions of a conception of justice to provide guidance in those areas where we are hesitant to pass untutored judgment [19-20].

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[4] That is, judgments made under conditions that are conducive to our coming to have knowledge in general, such as calmness on the part of the deliberating party, an absence of personal bias, etc.

We are not, however, to suppose that certain principles are the ultimate arbiters of the correct subset of our moral convictions. If we find that some of our strongest considered judgments cannot be accommodated by a proposed set of principles, and if we are not inclined to account for these convictions as cultural or psychological biases, then we must assume that the principles themselves are inadequate. In considering the compatibility of principles yielded by a particular construal of the original position with certain of our strong moral convictions, then, we are left with a choice:

> We can either modify the account of the initial situation or we can revise our existing judgments, for even the judgments we take provisionally as fixed points are liable to revision. By going hack and forth, sometimes altering the conditions of the contractual circumstances, at others withdrawing our judgments and conforming them to principle, I assume that eventually we shall find a description of the initial situation that both expresses reasonable conditions and yields principles which match our considered judgments duly

pruned and adjusted. [20]

In the notion of reflective equilibrium we see a departure from conventional twentieth century ethical philosophy. With the publication of Moore's Principia Ethica,[5] and the consequent focus of attention on the dreaded naturalistic fallacy, ethics centred on the question of whether there are analytic first principles of morality. Naturalists claimed that there are, insisting that ethical terms just mean that which can be expressed in non-ethical ones, and that therefore ethical judgments are empirically verfiable. For example, a naturalistic theory might define "right" as "productive of the greatest amount of total social happiness". To evaluate a claim that a particular action is right, then, we need only establish through scientific enquiry whether the action is likely to produce the greatest amount of total social happiness. On the other hand, intuitionists and noncognitivists claimed that there are no analytic principles of morality. Intuitionists held that we determine the truth of value judgments (including moral ones) through a direct apprehension or intuition of value properties in things. These value properties are not reducible to empirical ones; they are sui generis and therefore cannot be expressed in anything except synthetic ethical statements. Noncognitivism held that moral language expresses nothing but the attitudes of the speaker. A person making an ethical statement, therefore, is not asserting a claim that is true or false. Rather, he is expressing a feeling or attitude and trying to persuade others to feel the same way. Since statements that are neither true nor false cannot be analytic, there are no analytic first principles of morality.[6]

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[5] G. E. Moore, Principia Ethica (Cambridge: Cambridge University Press, 1903).

Rawls, however, adopts none of the above positions. Following the work of Quine and Goodman in philosophy of language, he dismisses questions of the analyticity of certain statements, ethical or otherwise, as fruitless. Instead, he proposes that ethical theory be subsumed under the problem of theory acceptance in general (51). According to this scheme we can expect that ethical theories are subject to the same sort of justification procedures as scientific ones, the foremost test being whether they provide the most systematic and efficient explanation of the observable facts, which in the case of ethical theories are our considered moral judgments. However, with the rejection of the analytic/synthetic distinction we are not to accept any statement, ethical or scientific, as self-evidently true. Theoretical analysis may ultimately persuade us to reconsider our characterization of the facts, and

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[6] The above mainly follows Paul W. Taylor's Principles of Ethics (Belmont, Ca.: Dickenson Publishing Co., 1975), especially chap. eight, "Values and Facts".

and vice-versa. Justification for any part of an ethical theory, therefore, depends on the coherence and efficacy of the theory as a whole (21).

With respect to justification in ethics, then, Rawls believes that coherence considerations play a seminal role.[7]

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[7] If we assume that to be a coherentist with respect to justification in ethics one must hold that any ethical judgment is acceptable only to the extent that it can be inferred from other ethical judgments of a certain kind, then it would be hasty to label Rawls a coherentist. There are some passages in TJ that could be interpreted as asserting that the considered moral judgments we make before entering the process of reflective equilibrium are due a certain amount of credibility simply in virtue of being the type of judgment we have a lot of confidence in, which credibility might be undermined once we entertain certain theoretical considerations. See TJ, 19. If this were the case Rawls would not be a coherentist because he would be admitting that certain moral judgments are at least *prima facie* acceptable whether or not they can be inferred from other ethical judgments. On the other hand, there are some passages in which Rawls clearly maintains that considered moral judgments are at least initially acceptable because we have reason to suppose that this sort of judgment is usually correct, the criterion for correctness presumably being that the judgment in question can be inferred from certain other ethical judgments (i.e., moral principles). See TJ, 47-48, and also Rawls, "Outline of a Decision Procedure for Ethics", *The Philosophical Review*, vol. 60 (1951), 180, 183. In this case since the credibility assigned considered moral judgments is ultimately a matter of their relation to other moral judgments, which judgments themselves are not self-evident (even *prima facie* self-evident) but are acceptable only to the extent that *they* are inferred from other moral judgments, Rawls indeed would be a coherentist. It is clear, however, that Rawls believes that once we enter the process of reflective equilibrium *no* moral judgment is acceptable except to the extent that it coheres with the rest of our ethical judgments at all theoretical levels. See TJ, 21, 48. For an analogue concerning the different ways in which considerations of coherence may affect the initial credibility of empirical statements see Roderick Firth, "Coherence, Certainty, and Epistemic Priority", *The Journal of Philosophy*, vol. 61 (1964). I am indebted to Bruce Hunter for suggestions concerning the above.

But apart from any general criticisms of systems of justification that incorporate coherentist elements, the procedure of reflective equilibrium, as we have so far described it, seems problematic. For the bald claim that a set of principles of justice matches our considered moral judgments seems little more than a direct appeal to our intuitions. And while Rawls contends that ethical intuitions (in the form of considered moral judgments) play a seminal role in justifying a conception of justice, without some independent support for his proposed principles he would seem to be open to the charge that he has _rigged_ them, and the original position from which they are derived, so as to fit our pre-contract judgments. Moreover, some have claimed that such an appeal to our intuitions amounts to no more than a description of what we happen to _feel_, with all of our cultural biases, and not an account of what we _ought_ to do.[8] Perhaps in anticipation of these objections, Rawls provides a second answer as to why we should accept principles that would be chosen by the original contractors:

> The answer is that the conditions embodied in the description of the original position are ones that we do in fact accept. Or if we do not, then

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[8] For detailed versions of both these criticisms see R. S. Hare, "Rawls' Theory of Justice", in Norman Daniels, ed., _Reading Rawls_ (Basic Books, New York), 88-107. See also Norman Daniels, "Reflective Equilibrium and Archimedean Points," _Canadian Journal of Philosophy_, vol. 10, (1980), 84.

> perhaps we can be persuaded to do so by philosophical reflection. Each aspect of the contractual situation can be given supporting grounds. Thus what we shall do is to collect together in one conception a number of conditions on principles that we are ready upon due consideration to recognize as reasonable. These constraints express what we are prepared to regard as limits on fair terms of cooperation. One way to look at the idea of the original position, then, is to see it as an expository device which sums up the meaning of these conditions and helps us to extract their consequences. [21]

The original contract, then, provides nothing in the way of justificatory support for the principles of justice that is not already contained in the background conditions that we presumably recognize as reasonable constraints on a conception of justice. This means that it is only if we accept these conditions, and only if we think that they are properly represented in the description of the original position, that we should accept the chosen principles as a prima facie representation of the correct conception of justice (subject to their match with our considered moral judgments).

The precise function of Rawls' contract apparatus in his justificatory system has been the subject of two particularly illunimating articles by contemporary philosophers. In "The Original Position"[9] Ronald Dworkin confirms the assertion that the original contract cannot in itself provide support for the principles of justice. Noting that a hypothetical contract on moral principles cannot be binding on actual people with informed interests, Dworkin convincingly argues that the purpose of the original position must be to draw attention to an independent argument for the fairness of Rawls' principles. Ultimately Dworkin concludes that the original contract is a conduit for a "deep theory" involving the fundamental right of persons to equal concern and respect in the design of their societal institutions, which right is narrowed down through the auspices of the contract to take the form of the principles of justice.

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[9] Ronald Dworkin, "The Original Position", University of Chicago Law Review, 40 (1973), reprinted in Norman Daniels, ed., Reading Rawls (New York: Basic Books, 1975).

In a more recent article Norman Daniels follows Dworkin's lead in contending that Rawls' background conditions should be interpreted as a deep theory.[10] Daniels takes the argument a step further, however, and characterizes this deep theory as part of a wide reflective equilibrium ranging over it, the principles of justice, and our considered moral judgments. Rather than immediately accepting a match between the proposed principles and our considered judgments, which would give us only a narrow reflective equilibrium, we advance philosophical arguments in the form of inferences from the background theory which are designed to highlight the strengths and weaknesses of competing principles. After deciding on the basis of such arguments that one set of principles is the most acceptable, we may work back and forth, variously revising our pre-contract moral judgments, the proposed principles, and the deep theory until we reach an equilibrium between these three sets of beliefs.

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[10] Daniels, "Reflective Equilibrium and Archimedean Points".

One immediate consequence of Daniels' interpretation is that Rawls is exempt from the charge that he has overtly rigged the original contract. For it cannot be maintained that wide reflective equilibrium merely systematizes a determinate set of pre-contract considered moral judgments. Rather, it permits the extensive revision of these judgments in light of theoretical considerations at all levels. As Daniels puts it, "Wide reflective equilibrium keeps us from taking considered moral judgments at face value, however much they may be treated as starting points in our theory construction."[11] However, he also points out that even with this more sophisticated account of reflective equilibrium there is room for a rigging charge against Rawls. This arises from the fact, which Rawls himself admits, that some of his background support for the description of the original position incorporates moral notions [584-585]. His conception of persons as free and equal moral beings, for example, specifies an ideal to which people in a just society ought to conform.[12] But since the proposed principles of justice themselves are ultimately to be tested against the set of our considered moral judgments, the posibility arises that some of the background conditions are merely reformulations of our pre-contract judgments. If this were the case, the principles would receive no confirmation beyond that which they would in narrow reflective equilibrium, in which no appeal is made to a deep theory. Daniels concludes that in order for Rawls' background theory to circumvent this new rigging charge it must be shown that the principles of justice are more acceptable than the alternatives on grounds to some degree independent of their match with our considered moral judgments.[13]

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[11] Daniels, "Two Approaches to Theory Acceptance in Ethics", in David Copp and David Zimmerman, eds., Morality, Reason, and Truth: New Essays on the Foundations of Ethics (Totowa, N. J.: Rowman and Allanheld, 1985).

Before we examine Daniels' conclusion more closely, we might note a possible objection to his isolating the moral aspects of Rawls' deep theory as the proper subject of an independence constraint. The original position, it might be claimed, is backed by an amalgam of considerations, which apart from moral notions include empirical generalizations such as general social theory and the theory of moral development, and certain formal constraints of the concept of right. Perhaps if the independence constraint is violated with regard to one or more of the moral premises incorporated in the contract apparatus these other grounds of support will provide all the extra justification that is needed. Or, failing this, perhaps a weaker claim can be made to the effect that the formal or empirical considerations significantly limit the employment of certain moral ones as reasonable background support. In either case justification would be lent to the principles of justice which is independent of their match with our considered moral judgments.

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[12] Daniels correctly notes that as an empirical theory the notion of free and equal persons is probably false, as not all historical personalities have possessed these qualities. See Daniels, "Reflective Equilibrium and Archimedean Points", 94-95.

[13] Daniels, "Reflective Equilibrium and Archimedean Points, 86.

This objection is a relevant one, for it is certainly true that Rawls draws on a variety of empirical and formal generaliztions in arguing for his two principles.[14] It is clear, for example, that in the form of feasibility conditions certain empirical theories play an important role in reducing the number of acceptable conceptions of justice. For instance, if a conception should prove economically or politically unstable it must be rejected. The original contractors are only interested in those principles of justice that would be followed in a well-ordered society, which among other things is one that is enduring as a system of social cooperation [453-462]. In broaching the topic of the significance of empirical theories with regard to an independence constraint, we may first note that Rawls does not subscribe to any form of ethical naturalism. That is, while remaining uncommitted as to whether a sharp distinction can be drawn between statements of fact and of value, Rawls maintains that secondary moral rules and particular ethical judgments depend both upon factual premises and what we normally recognize as normative principles [160, 578-579]. Therefore he does not suppose that anything in the way of distinctive first principles of justice can be derived solely from empirical background theories (i.e., through the auspices of the original position). Moreover, it follows from the above that empirical considerations also cannot determine the preferability of certain moral premises as appropriate to the background support. The Aristotelean Principle, for example, holds that, other things equal, people prefer the exercise of their realized capacities and this enjoyment increases the more the capacity is realized, or the greater its complexity. The ability to perform complex activities, therefore, will both increase a person's self worth and the admiration of those around him. A conception of justice must accommodate this principle by providing an arena for people to pursue life plans that are sufficiently complex and mutually complimentary, thereby securing the bases for mutual and self respect. The Aristotelean Principle, however, does not favour, say, any one conception of the moral person as that which should be represented in the contractual arrangements of the original position. Whether the contracting parties are Kantian autonomous agents or benevolent and perfectly informed spectators they must search for a conception of justice that encourages the fullest exercise of people's natural abilities and which secures the bases of their mutual and self respect. As long as the resulting conception meets these conditions it, and the notion of the moral person on which it is based, is compatible with the above empirical generalization.[15] Rawls of course argues that his conception of justice meets the conditions implied by the Aristotelean Principle [178-183]. But we may note in this context that utilitarians often appeal to laws of human nature to account for judgments which seem to violate the principle of utility.[16] It is not inconceivable, therefore, that a defender of utilitarianism might accommodate the Aristotelean Principle by postulating the basic liberties, reasoning that securing the bases for self-respect within society would best answer to the collective interest. Indeed, Rawls suggests that feasibility constraints such as the Aristotelean Principle are met by all of the traditional ethical conceptions.[17]

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[14] Reference to empirical theories is made throughout the book, but see especially Rawls' description of "the well-ordered society", TJ, 453-504. For a list of the formal constraints see TJ, 130-136.

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[15] For a discussion of the Aristotelean Principle see TJ, 424-443. See TJ, 440-446 for an explanation of its connection with the primary good of self-respect.

[16] See, for example, J. S. Mill's reference to the natural human interest in personal security as justification for including claims of justice under the general rubric of selecting moral virtues that benefit the collecive interest in Utilitarianism, in Utilitarianism, On Liberty, and Considerations on Representive Government, H. B. Acton, ed. (London: Everyman's Library, 1983), 50-51.

The issue concerning Rawls' formal constraints is more complex. We may first note that these constraints -- generality, universality, publicity, ordering, and finality -- are proposed as very weak conditions on ethical principles, and are presumed to be derived purely from the role which such principles are seen to play in adjudicating conflicts of interest within society. As such, they are thought by Rawls to be met by all of the traditional conceptions of justice from which the original contractors are to choose [131]. If this were true then the conditions mentioned likely could not offer the sort of independent support that Rawls needs for his principles. However, it has been claimed by some philosophers that these constraints are not as innocuous as they might appear. For example, in "Fair Contracts and Beautiful Intuitions" G. E. Pence argues that four out of the five constraints beg the question against certain forms of utilitarianism.[18] Whether or not such criticisms are correct the fact remains that Rawls' formal constraints do exert some normative force on the choice of the original contractors. Rawls admits as much when he points out that the formal constraints rule out the various forms of egoism from the choice of the contractors [131, 136]. This in itself does not mark the constraints as inappropriate to Rawls' deep theory, for he is careful to maintain that they do not follow analytically from the concept of right or the meaning of morality. Rather, they are part of a substantive theory of right and therefore stand or fall with the soundness of the theory as a whole [130-131]. The fact that they are not void of normative content, however, means that they must be subject to the sort of independence constraint we have been considering. Far from offering support for the principles of justice that is obviously disjoint from moral notions in the background theory, these constraints are part of the very body of judgments that must be shown not to be reformulations of our pre-contract considered moral judgments.

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[17] Rawls, "The Independence of Moral Theory", Proceedings and Addresses of the American Philosophical Association, vol. 48 (1974-1975), 20. See also TJ, 455, where Rawls states that the criterion of stability in a moral conception is not decisive in favouring it over alternative conceptions.

All of this goes to show that something like Daniels' independence constraint is required of Rawls' background support if it is to provide justification for his principles beyond their match with our considered moral judgments. Contrary to the objection we have been considering, the empirical theories at work in the original position cannot determine either specific ethical principles or moral notions in the deep theory as any more appropriate or preferred than their alternatives. And, somewhat ironically, the formal constraints of the concept of right turned out to be part of the very body of theory that we presumed to be liable to violations of an independence constraint. Consequently, it is apparent that the moral portion of Rawls' deep theory supplies the brunt of justification for his conception of justice. Rawls acknowledges this point, contending that "ethical first principles differ in the extent to which they incorporate the desired moral ideal [160]." It is appropriate, then, that the normative notions at play in the deep theory be in some sense disjoint from our considered moral judgments. For if they are not, the entire contract apparatus becomes of dubious justificatory value.

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[18] G. E. Pence, "Fair Contracts and Beautiful Intuitions", in Kai Nielson and Roger A. Shiner, eds., New Essays on Contract Theory, Supplementary Vol. 111 (1977), 144-145.

In the rest of this essay I attempt to refine the notion of an indepependence constraint for moral theories and then apply it to Rawls' own substantive ethical theory. In chapter two I begin with an examination of Rawls' account of the general features of considered moral judgments, and then proceed with an analysis of his remarks concerning the specific characteristics that denote judgments of justice.

I then note an important objection to his theory that charges that he does not have the consensus on considered moral judgments he needs to support his two principles of justice. I admit the potentcy of this challenge, but argue that it is still of interest to see how his theory fares *given* the consensus he requires. I then examine in detail Daniels' suggestion as to an independence constraint for moral theories. I contend that although his formulation does much to reveal the manner in which Rawls' deep theory must be supported by considered moral judgments disjoint from those of justice, it is ultimately inadequate to ensuring the validity of his ethical principles, which apart from those of justice include those pertaining to other major areas of ethical enquiry. I then offer a revised version of Daniels' formulation, which I claim is superior in that it more fully discloses both the comprehensive nature of Rawls' moral system and the sense in which considered moral judgments must be prohibited from appearing as reformulations in the deep theory.

In chapter three I apply my revitalized independence constraint to the portion of Rawls' deep theory that is represented by his reasoning for the inclusion of the veil of ignorance in the description of the original position. I begin by examining and rejecting in turn all of the arguments he overtly acknowledges as justification for the veil, including his widely discussed views on the impropriety of using the notion of moral desert as the basis for distributive shares. I then reveal what I believe to be the real substance of Rawls' defence for the veil, which I argue is contained in his exposition concerning the essentially social nature of questions of justice. In this context I employ some of Robert Nozick's criticisms of Rawls' theory so as to clearly delineate the basic normative presumption underlying his inclusion of the veil in the circumstances of the original position. I then proceed to show that this judgment, considered as part of Rawls' deep theory, violates the independence constraint. I do this in two ways. First, I argue that the judgment in question is identical in all relevent respects to Rawls' general conception of justice, of which his two more specific principles are a special case. In the process of establishing this as a genuine violation of the independence constraint I reply to the objection that the general conception is merely an initial stage in the contractors' deliberations and is therefore not part of the body of judgments Rawls' deep theory is meant to explain. I point out that his theory of justice includes both an ideal and nonideal conception, and argue that as his general principle of justice is meant to range over both of these domains it must be subject to our considered moral judgments and therefore to the independence constraint. The other method I employ to indicate a violation of the independence constraint focuses on the general characteristics of considered moral judgments as opposed to background theoretical ones. Using an analogy from philosophy of science and certain of Rawls' remarks concerning the abstract nature of the statements of his deep theory, I argue that these statements cannot, on pain of violating the independence constraint, make reference to empirically identifiable states-of-affairs. I then show that the moral judgment I have attributed to Rawls as justification for the veil does make such a reference, and so violates the independence constraint.

In my concluding remarks I attempt to show how Rawls could have been led into committing the form of explanatory circularity I have charged is engendered in his deep theory. I suggest that there is a fundamental tension between his accounts of the process of reflective equilbrium and of the nature of the statements appealed to in the defense of his construal of the original postion. What results is a reinterpretation of the role the social contract can play in a basically scientific approach to ethical theory building. I closing I discuss two objections to this interpretation that are suggested by some of Rawls' remarks concerning the pragmatic aims of ethical theory. In answering them I dispel what I see to be a misconception on Rawls' part concerning the accessibility of complex moral theory to the layperson, and emphasize that a general moral theory that fails the independence constraint cannot explicate our considered moral judgments in the required sense.

THE INDEPENDENCE CONSTRAINT

In discussing what sort of independence constraint Rawls' deep theory must meet, a reasonable starting point would seem to be an investigation into the nature of the considered moral judgments for which the principles of justice are meant to account. For without a clear characterization of these judgments we will have no way of knowing whether they reappear in some form or another in the deep theory. What, then, are considered moral judgments? Rawls tells us that they are those judgments in which our moral capacities are most likely to be displayed undistorted [47]. In addition they are judgments which we make intuitively and in which we have the greatest confidence [19]. And finally, they are the class of facts against which conjectured ethical principles are to be checked [51]. With regard to the first of these suggestions, Rawls contends that in order to make sure the relevant judgments are a true representation of our ability to distinguish justice from injustice they must be subject to the sorts of conditions that characterize our coming to know things in general. Persons making considered moral judgments are therefore presumed to have the ability, the opportunity, and the desire to arrive at the correct decisions [48]. Taking these properties in order, a person making a considered moral judgmemt presumably must be possessed of a certain degree of intelligence, although on the assumption that moral insight is something of which everyone is capable, the requisite degree must not be too high. He must also be in a position to make judgments which are impartial and in which he has a high degree of confidence. Thus he will likely reject judgments made when he stands to gain something or when he is under duress. And lastly, the moral judge must be working from a sincere desire to discover what sorts of situations are just or unjust. If he doesn't take questions of justice seriously, if he thinks them irrelevant as to how he or we ought to live our lives, he is unlikely to invest the time or effort necessary to reach accurate decisions.[19]

Returning to the remaining two of Rawls' general remarks on the nature of considered moral judgments, we have that they are facts which we intuitively recognize and against which the principles of justice are to be measured. On the intuitive aspect of the relevant judgments Rawls states that

> By the term "intuitive" I do not mean the same as that expressed by the terms "impulsive" and "instinctive". An intuitive judgment may be consequent to a thorough inquiry into the facts of the case, and it may follow a series of reflections on the possible effects of different decisions, and even the application of some common sense rule,

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[19] For a more detailed discussion of the above conditions see Rawls' "Outline of a Decision Procedure for Ethics", 178-183.

> e.g., promises ought to be kept. What is required is that the judgment not be determined by a systematic and conscious use of ethical principles. The reason for this restriction will be evident if one keeps in mind the aim of the present inquiry, namely, to describe a decision procedure whereby principles, by means of which we may justify specific moral decisions, may themselves be shown to be justifiable. Now part of this procedure will consist in showing that these principles are implicit in the considered judgments of competent judges. It is clear that if we allowed these judgments to be determined by a conscious and systematic application of these principles, then the method is threatened with circularity. We cannot test a principle honestly by means of judgments wherein it has been consciously and systematically used to determine the decision.[20]

It is clear that considered moral judgments are meant to correspond to observation statements in the empirical sciences. They are thus intuitive in the sense that they refer to states-of-affairs with which we are all familiar and about which we can make isolated and noninferential judgments.[21] The typical form of a considered moral judgment will therefore be one in which the empirical aspects of the case in question are stated, as well as the interests in conflict, followed by a prescription signifying which of the interests is/are to take precedence.[22] As Rawls notes, however, such a judgment may be the result of the application (or perhaps may even take the form) of a low-level generalization, e.g., promises ought to be kept. Presumably this is legitimate only if the rule in question generalizes over a fairly specific set of cases with which we are familiar and about which we have strong ethical intuitions. As soon as we begin appealing to rules which generalize over even those situations about which we have no firm convictions, as do Rawls' principles of justice, we run the risk of threatening our theoretical endeavors with the sort of circularity noted above by Rawls.[23] It is important to note, however, that observational generalizations of whatever level of abstraction are only acceptable to the extent that they offer true accounts of individually isolatable events. The status of certain low-level moral generalizations as facts, therefore, is a borrowed one, dependent upon the actually observed cases over which they generalize.

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[20] Rawls, "Outline of a Decision Procedure for Ethics", 183.

[21] That is, noninferential with respect to *ethical principles*. Presumably there may be some sort of inferential relation between a given considered moral judgment and the empirical facts that are thought relevant in the situation under observation. For example, Rawls says in the passage cited above that a considered moral judgment may follow a series of reflections on the possible effects of different decisions. Suppose we make such a judgment based on a prediction that a particular decision will among the alternatives result in the least amount of people being harmed. This would count as a legitimate reason for making the judgment in question, as long it were not a veiled appeal to an ethical principle, e.g., the principle of utility.

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[22] Rawls, "Outline of a Decision Procedure for Ethics", 186.

[23] Treating certain low-level moral generalizations as facts which are to be explained by theoretical principles is consistent with typical scientific practice. Explanations of particular events in science are relatively rare -- perhaps found only in geology and astronomy. The exact point at which explanation in either science or ethics becomes threatened with blatant circularity is not likely specifiable, but presumably increases with the level of generality of the "facts" being explained.

Having secured the main characteristics of considered moral judgments, we must now turn to the more specific topic of considered moral judgments of justice. Rawls is quite explicit on this point, contending that "For us the primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation [7]." His reasoning for this position is complex, but, as we noted in chapter one, it rests most firmly upon the idea that the basic structure of society in large part determines the expectations of persons born into different social circumstances. Societal institutions may thus ensure, either directly or indirectly, that some have a more favourable starting place than others, which advantage cannot be justified by appeal notions like merit or desert [7]. It is to such basic and pervasive inequalities that Rawls believes the principles of justice must be addressed. Applying what we have established above concerning the nature of considered moral judgments in general, we may complete our characterization of considered judgments of justice with the following:

> Considered judgments of justice are those judgments which when made under the appropriate conditions either endorse or censure particular

> states-of-affairs, or limited sets of states-of-affairs, in which a distribution of basic rights or economic amenities is instantiated and which is regulated by the basic institutional structures of society.

Before we get on with the business of establishing what sort of independence constraint Rawls' deep theory must meet, there is an important objection to the role considered moral judgments play in his theory that we should note. In his first mention of these judgments in A Theory of Justice Rawls says: "There are questions which we are sure must be answered in a certain way. For example, we are confident that religious intolerance and racial discrimination are unjust [19]." Who is the "we" in this passage? If it is meant to refer to all persons in all places, then it seems as though Rawls has a problem. For the considered judgments that he refers to throughout his book are of a peculiarly Western liberal social-democratic sort. As Steven Lukes notes, they describe a world in which

> There would be less inequality of wealth, no inherited privilege, no educational discrimination against social groups or the economically disadvantaged, no unearned income except on the basis of merit, and contribution to the common good, equality of opportunity, no deference not based on praise, the authority of positions to be mutually agreed upon in advance of their being occupied, maximum consultation before administrative decisions and unlimited comparisons between social positions in the bringing of claims

aganst one another. [24]

The obvious question to ask here is why we should accept the values of certain modern Western persons as the source of moral judgments against which to test a set of abstract principles of justice. Surely a better answer is required than simply that these judgments are the correct ones, for on what grounds could Rawls make such a claim? Perhaps in reaction to this sort of question, Rawls, in his more recent articles, has admitted that his principles are meant to represent a conception of justice that only members of a modern constitutional democracy will accept.[25] But although this admission may soften the present criticism somewhat, it doesn't get Rawls out of trouble. For as Lukes points out, even within our own present Western democracies there are ultra-conservatives, clinical authoritarians, Empire Loyalists, facist racial separatists, Saint Simonian technocrats, individualist liberal anarchists, and radical egalitarians.[26] None of these factions are likely to assent to Rawls' considered moral judgments. In fact, they will all likely disagree among themselves. How, then, can Rawls claim that his liberal social-democratic judgments are the correct provisional fixed points which a conception of jusice must accomodate?[27]

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[24] Steven Lukes, "Relativism: Cognitive and Moral", Aristotelean Supplementary, 48 (1974), 184.

[25] See Rawls, "Kantian Constructivism in Moral Theory", Journal of Philosophy, 77 (1980), 515-573, 517-518, and "Justice as Fairness: Political not Metaphysical", Philosophy and Public Affairs, 14 (1985), 224-251, 225-227.

[26] Lukes, "Relativism: Cognitive and Moral", 182-183.

There is one other possible way out of the present problem for Rawls. He might claim that the considered judgments to which he appeals are those which would be made by "competent moral judges". We noted above some of the qualiies that he thinks these judges must have, namely, the ability, the opportunity, and the desire to make correct judgments of justice. In "An Outline of a Decision Procedure for Ethics" he elaborates on these characteristics and adds that a competent moral judge "is required to have a sympathetic knowledge of those human interests that by conflicting in particular cases, give rise to the need to make a moral decision.[28] For this the judge must have experienced as many sorts of human interests as possible, and must in addition be capable of imaginative sympathy in those cases where people display interests that he has not experienced.[29] The idea is for the moral judge to give each possibly conflicting human interest as much weight as if it were his own. Perhaps people who are sufficiently qualified in the above respects will reach a consensus on a limited class of moral judgments. However, even if this were true, the question would still remain as to which judgments the "moral experts" would agree upon.

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[27] Indeed it seems that any relativistic ethical/political theory is saddled with the problem of showing which common agreements or "social meanings" are relevant to the inquiry at hand. This would seem especially diffícult in poltically diverse countries such as Canada and the U. S.

[28] Rawls, "Outline of a Decision Procedure for Ethics", 179.

[29] Rawls, "Outline of a Decision Procedure for Ethics", 179-180. This imaginative sympathy is not of the sort assumed to be employed by an ideal spectator in certain versions of utilitarinism. Rawlsian sympathy is simply the requirement that all interests be viewed fairly and impartially. There is no further injuction to satisfy the greatest net or average sum of these interests.

Rawls offers no reasons in A Theory of Justice or elsewhere for us to suppose that they will agree on just those judgments to which he appeals to test his principles of justice. Without such reasons, we are left to wonder why Rawlsian considered moral judgments deserve the justificatory status that he ascribes them.

I believe that the above considerations represent serious problems for Rawls' theory of justice, and that his account ultimately may founder because of them. But however telling are such challenges I believe that it is still of interest to us to see if an account of our moral sentiments such as his will work, given a consensus on considered moral judgments. Rawls is surely correct in supposing that justificatory argument must begin with premises that all parties to the discussion hold in common and end with consequences that they all can accept [587]. If we believe that in addition to this there can be no justification for an eithical theory on purely a priori grounds, then we are forced to admit that our shared ethical judgments must play a significant role in moral reasoning. This being the case, ethical relativism of an even more radical sort than that preached by Rawls may just be an unavoidable consequence of the moral enterprise. Alternatively, it might be that the problem of isolating those judgments that would be made by "moral experts" is more practical than conceptual. If people really are intelligent, well-informed, and imaginitively sympathetic, they will likely possess an unbiased view of ethical situations. Whether either of these alternatives is correct is itself a subject for a dissertation. I shall simply assume from here on that Rawls has the consensus he needs on the relevant judgments, and attempt to show how his theory fares on that basis.

Returning to the notion of an independence constraint for Rawls' deep theory, let us consider Daniels' suggestion. Given (a), a set of considered moral judgments; (b), a set of ethical principles; and (c) a set of relevant background theories; Daniels claims that

> We should require that the theories in (c) not be reformulations of the set of considered moral judgments, (a), to which we seek to "fit" the principles in (b). The background theories should have a scope reaching beyond the judgments in (a). Suppose that some set of considered moral judgments, (a'), plays a role in constraining the background theories in (c). Then we are asking that some interesting, non-trivial portion of (a') should be disjoint from the set (a) that constrains the principles in (b). Our independence constraint is the requirement that (a') be to some significant degree disjoint.[30]

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[30] Daniels, "Reflective Equilibrium and Archimedean Points",

Taken at face value Daniels' suggestion is unclear. Apart from questions concerning the meaning of terms such as "reformulation" and "scope", we ae left to wonder in exactly what sense the relevant judgments in (a') must be disjoint from those in (a). Daniels attempts to answer such questions by means of an analogy. In analyzing Rawls' theory of justice we want to make sure that his two principles are not just "accidental generalizations" of the moral facts (considered moral judgments) in the same way that we want to avoid confusing accidental generalizations in science with genuine laws:

> In the scientific case we have evidence we are not stuck with accidental generalizations if we can derive the purported laws from a body of interconnected theories, provided these theories reach beyond the "facts" in a diverse and interesting way.

There are a number of interrelated issues surrounding the alleged distinction between laws of nature and accidental generalizations in philosophy of science.[31] One such issue is the question of what sort of logical properties a statement must display to warrant its being considered a law. For example, it is generally agreed that

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[31] In what follows I borrow heavily from Earnest Nagel, *The Structure of Science* (New York: Harcourt, Brace, and World, 1961), especially chap. 4, "The Logical Character of Scientific Laws", and from R. S. Walter, "Laws of Science and Lawlike Statements", *Encyclopedia of Philosophy* (1972 ed.), vols. 3 and 4.

a minimum necessary condition of any scientific law is that it be a true, nonanalytic, universal generalization. Other suggestions include that a law must be an "unrestricted" universal generalization (it must not be logically entailed that the term that is universally quantified in the statement in question denotes a closed or finite system) and that it be capable of supporting subjunctive conditionals, including counterfactuals. Another topic of discussion concerns the relation a law asserts between its antecedent and its consequent (most laws take the form of "All A's are B's", which can be transcribed to read "If x is an A, then x is a B"). Necessity theorists argue that this relation is a necessary one, which can be expressed in terms of logical necessity or something weaker as long as it cannot be reduced to an appeal to merely contingent statements. Regularity theorists, on the other hand, claim that laws only assert a contingent concommitance or constant conjunction between antecedent and consequent, and further that this is all they need to fulfill their role in scientific explanation.

The issue that Daniels alludes to, however, is the primarily epistemological one of what kind of evidence we must have for a statement before we are justified in calling it a law. Briefly, there are two kinds of evidence that may be offered in support of a proposed law: direct and indirect. Direct evidence consists in instances that fall within the scope of predication of the proposed law. For example, direct confirming evidence for the putative law that copper expands when heated is provided by strands of copper that expand when heated. Indirect evidence for a statement is obtained when a proposed law can with other laws be derived from a more general law, in which case the direct evidence for the other derived laws provides indirect evidence for the one in question. For example, the Boyles-Charles law concerning the expansion of heated gases and Graham's law of diffusion are jointly derivable from the same laws of mechanics. Consequently, it is customary to count the direct confirming evidence for Graham's law as indirect confirming evidence for the Boyles Charles law, and vice-versa.

In practice, scientists normally characterize statements which have both direct and indirect confirming evidence as laws, and those that have only direct confirming evidence as "empirical" or "accidental" generalizations. The former sort of statement is considered much more strongly grounded than the latter, which might commonly be rejected in the face of even prima facie evidence to the contrary. For example, the statement "All ravens are black", which, having only the support of observed instances, is traditionally considered an accidental generalization, would likely be rejected should a bird be found with white plumage that is ostensibly a raven. In contrast, the statement "All species of birds surviving in snowy regions are white", which might be labelled a law in virtue of the fact that apart from being confirmed by observed instances it is derivable from the principle of natural selection, might not be rejected if a black bird were found in the arctic. Such seemingly disconfirming evidence would at least at first likely be dismissed on grounds of incorrect observation procedures or carelessness in accepted technique.[32]

The justification for assuming such divergent attitudes toward the status of laws and accidental generalizations in the face of seeming disconfirmation becomes clearer when we consider the implications of a law's being interrelated with other statements within a science. Simply put, a law does not stand alone. In the case of an accidental generalization all that is at stake is the statement itself and any that are derivable from it.. The case is different, however, with a proposed law that is part of a diverse heirarchy of generalizations. Rejection of this sort of statement would entail a serious reorganization of parts of the corpus of knowledge to which it belongs. But such a reorganization may not be feasible in the absence of an alternative system that is at least as comprehensive as the original and which in addition can account for the anomalous evidence. In such an event a more attractive alternative might be the reinterpretation of apparent exceptions to a proposed law so that the former are construed as not "genuine" exceptions at all.[33]

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[32] See Nagel, The Structure of Science, 65-66.

The case is somewhat different for Rawls' principles of justice, for there is as of yet no established science of ethical generalizations to provide varying degrees of support for proposed moral principles. Daniels' analogy is nevertheless an important one just in case Rawls is attempting the comprehensive justification of his theory that Daniels credits him with. Given Rawls' own admission that the class of our considered judgments of justice is a limited one [19-20], such evidence could only tenuously support his principles as "laws" of justice. However, if it could be shown that those principles are part of a comprehensive account of our judgments in a number of diverse areas of ethical enquiry, the principles would receive a much higher degree of credibility. For then they would obtain in addition to the directly confirming evidence of our considered judgments of justice indirect support from within the proposed ethical system in the manner outlined above. We may reconsider in this connection the rigging charge we originally considered bringing against Rawls in chapter one. We conjectured that unless his principles received support apart from their fit with our judgments of justice Rawls might be guilty of rigging them so as to match our pre-contract judgments. We can now see that there is nothing illegitimate about such a practice. If our pre-contract judgments were capable of immediate and complete systematization by means of Rawls' principles of justice, those principles would have to be accorded at least prima facie justification on this count alone. The point is that without their being subsumable into a more comprehensive ethical system their justification could only be minimal, perhaps along the lines of that granted empirical generalizations in the natural sciences.

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[33] In certain extreme cases anomalous evidence that cannot be discredited may be "shelved" in the hope that future elaboration of the established system may be able to deal with them. See Thomas Kuhn, The Structure of Scientific Revolutions (Chicago: University of Chicago Press, 1962), chaps. 6 to 8. It is important to note that even a generalization that entails a wide variety of laws of lesser scope will receive only tenuous support as a law if it cannot be related to other important areas of inquiry. A proposed law is secure only if in addition to entailing less general laws it can itself be derived from a law or laws of greater scope. Of course the requirement in question must be abandoned once we reach the ultimate laws in a science, for by definition they cannot be derived from laws of greater scope. Only these generalizations, i.e., ultimate laws, enyoy lawlike status solely in virtue of the number and variety of laws they entail.

Regarding Rawls' principles of justice, then, Daniels is concerned that the background theory which is to support them be confirmed by evidence apart from the direct evidence for the principles themselves. It is in this sense that a certain subset of our considered judgments must be disjoint or independent from our judgments of justice. Given that we have established the problem of identifying the status of Rawls' principles as primarily an epistemological one, let us explicate the relevant sense of independence in terms of acceptability conditions for two different statements, x and y, relative to a person, P, at time t. To wit:

1. y is made acceptable independently of x for P at t just in case y is made acceptable for P at t by evidence that does not make x acceptable for P at t.[34]

from which follows

2. If y is made acceptable for P at t solely by evidence which also makes x acceptable for P at t, then y is not acceptable independently of x for P at t.

Notice that (2) generalizes over the instance in which y is literally a reformulation of x, in which case since y would be made acceptable on the same evidence as x, y would not be acceptable indendepently of x.

Applying the above we can restate Daniels' independence as follows: Given a set of considered moral judgments, (a); a set of moral principles, (b); and a relevant background theory,(c);

> Suppose that some set of considered moral judgments, (a'), plays a role in constraining the background theory in (c). Then we are asking that some interesting portion of (a') be acceptable independently from the set, (a), that constrains the principles in (b).

What remains is to determine what sort of moral judgments Rawls draws on to support his background theory, and whether they meet Daniels' independence constraint. In A Theory of Justice Rawls contends that it is the particularly construed ideas of the person and of a well-ordered society, together with the mediating conception of the original position, that provide an Archimedean point from which which we can appraise proposed principles of justice [260-263]. In a later article he lists twelve conditions which are supposed to embody the first two of these conceptions. The first three conditions specify that a well-ordered society is to be regulated by a public conception of justice:

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[34] For this construal of independent acceptability and for subsequent portions of my reformulation of Daniels'

1. Everyone accepts, and knows that others accept, the same principles (the same conception) of justice.
2. Basic social instititutions and their arrangement into one scheme (the basic structure of society) satisfy, and are with reason believed by everyone to satisfy, these principles.
3. The public conception of justice is founded on reasonable beliefs that have been established by generally accepted methods of inquiry.

The next three indicate the sense in which members of a well-ordered society view themselves as free and equal moral persons:

4. They each have, and view themselves as having, a sense of justice (the content of which is defined by the principles of the public conception) that is normally effective (the desire to act on this conception determines their conduct for the most part).
5. They have, and view themselves as having, fundamental

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independence constraint I am indepted to Bruce Hunter.

aims and interests (a conception of their good) in the name of which it is legitimate to make claims on one another in the design of their institutions.

6. They each have, and view themselves as having, a right to equal respect and consideration in determining the principles by which the basic structure of their society is to be regulated.

Conditions 7-10 describe the manner in which a well-ordered society is stable (and therefore feasible) and the circumstances of justice that the society in question is presumed to operate under (such as moderate scarcity, etc.). They are free of normative content (except in the sense in which a stable society is desirable); therefore we will not pursue them here. Conditions 11 and 12 describe the proper subject of the principles of justice:

11. The role of the principles of justice (the public conception) is to assign rights and duties in the basic structure of society and to specify the manner in which it is appropriate for institutions to influence the overall distribution of benefits and burdens.
12. The members of a well-ordered society take the basic social institutions and their arrangements into one scheme as the primary subject of justice (as that to which the principles of justice are in the first instance to apply).[35]

The task is to establish which conception of justice is most appropriate given this theory, or more precisely, which of a few representative conceptions from the tradition of moral philosophy is the best fit. Ideally we should like to deduce a conception of justice directly from this theory, but given the vagueness of some its component statements this would seem impossible. Rawls' proposed alternative to such a direct derivation is of course to embody what is expressed in the statements in a hypothetical contract situation that is fair between the participants. Thus we have the description of the original position. The fairness of the circumstances under which an agreement is reached is presumed to transfer to the principles chosen. Since these are to serve as the principles of justice, we have the notion of "justice as fairness".

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[35] The above conditions appear in Rawls, "Reply to Alexander and Musgrave", The Quarterly Journal of Economics, 88 (1974), 634-636.

What sort of considered moral judgments can Rawls appeal to as independent (i.e., from our judgments of justice) support for the statements in the above theory? We may first note that in our day-to-day lives we make many kinds of moral judgments that are ostensibly distinct from those concerning the basic distribution of liberties and economic amenities. We make judgments concerning our obligation to keep promises, not to lie, not to needlessly harm others, etc. We make judgments concerning individual entitlements and whether or not and how much people ought to be punished. And last but not least we pass judgment on peoples's moral worth, i.e., on whether they are good, evil, praiseworthy, etc. None of these judgments are in any obvious way concealed or reformulated judgments of justice. It would seem, then, that these kinds of judgments, or perhaps some subset of them, are candidates for the independent moral support Rawls needs for his background theory.

Rawls is of course aware that there are many sorts of moral judgments apart from those of justice. In A Theory of Justice he offers a schematic diagram in which the major concepts of ethics are identified as those of value (the good), moral worth, and right [109]. The concept of right is further categorized into principles governing the law of nations, those of justice for social systems, and those of natural duty and obligation for individuals. If we assume with Rawls that this exhausts the kinds of moral judgments we make concerning our relations with other people, then it seems he must utilize all or a portion of those that are disjoint from our judgments of justice as support for his background theory.[36] Significant to this discussion is the fact that Rawls takes all of the principles governing the major ethical concepts to be derivable from the decision problem represented by the circumstances of the people in the original position. This is evidenced by the following passages:

> A good person...a person of moral worth, is someone who has to a higher degree

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[36] Rawls' contractarian approach cannot accomodate moral judgments concerning non-persons (i.e., beings that cannot have reciprocal ethical relations with us). Some have claimed that his theory is inadequate on this count. See, for example, Peter Singer, Practical Ethics (Cambridge: Cambridge University Press, 1979), 68-71.

> than average broadly hased features of moral character that it is rational for persons in the original position to want in one another [437].

> ...one may extend the intepretation of the original position and think of the parties as representatives of different nations who must choose together the fundamental principles to adjudicate conflicting claims among states...Justice between states is determined by the principles that would be chosen in the original position so interpreted [378].

> I want to say that one conception of justice is more reasonable than another, or justifiable with respect to it, if rational persons in the original position would choose its principles over those of the other for the role of justice [17].

> ...to establish a complete conception of right, the parties in the original position are to choose in a definite order not only a conception of justice but also principles to go with each major concept falling under the concept of right...Thus, in addition to principles for institutions there must be an agreement on principles for such notions as fairness and fidelity as these apply to individuals [111].

The full theory of the good is not wholly deducible from the original position because it will in part depend on what each person rationally desires in the context of a long term life plan [416-424]. However, Rawls is emphatic that what can finally be considered as good for each individual must be compatible with the principles of right, which principles are deducible from the original position. Within the conception of justice as fairness this is expressed by saying that the concept of right is prior to that of the good [31].[37]

All of the principles encompassing judgments falling under the major ethical concepts, then, are presumed to be derivable, through the auspices of the original position, from Rawls' deep theory of human society. Thus in addition to the direct confirmation each set of principles obtains in virtue of its supposed match with the relevant set of our considered moral judgments, it also receives indirect support from the judgments which directly confirm the other principles jointly derivable from the background theory.[38] The background theory itself takes on the role of an ultimate theory, deriving its support from the number and variety of judgments it entails.[39] Therefore, assuming Rawls' ethical principles do match our considered moral judgments in reflective equilibrium, they, including the principles of justice, would seem to merit a status akin to that accorded laws of nature in the empirical sciences.

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[37] The thin theory of the good, which Rawls uses to explain the original contractors' preference for primary goods, incorporates nothing in the way of recognizably moral notions. It is based entirely upon certain psychological laws concerning human motivation and the standard account of rationality employed in welfare economics. See TJ, chapter 7, "Goodness as Rationality", 395-452.

[38] This assumes that judgments falling under the moral concepts that Rawls differentiates from that of justice are disjoint from those subsumable under the latter concept in the sense specified by Daniels' independence constraint. I will adhere to this assumption in what follows.

[39] As noted earlier, there are some of our moral judgments that do not fall under the above ethical concepts, e.g., those concerning the treatment of animals. A truely ultimate ethical theory would account for all of our moral judgments, interpersonal and otherwise. Presumably, such a theory could not be represented in a hypothetical contract between moral persons.

Another consequence of such a comprehensive ethical justificatory scheme is that the background theory apparently meets Daniels' independence constraint. Daniels is concerned that the deep theory be constrained or supported by considered moral judgments independent from those against which the principles of justice are to be tested. If Rawls' deep theory of human society does entail the variety of moral principles and corresponding considered moral judgments he claims it does, then it seems as though it is confirmed by judgments other than those of justice. Moreover, the same can be said regarding any of Rawls' proposed moral principles. When considered alone each set of principles is derivable from a deep theory that is constrained by considered judgments independent from those against which the principles in question are to be measured.[40]

It is important to note, however, that just because a set of principles is derivable from the deep theory this does not guarantee it the kind of status accorded a scientific law of nature. For it may still be the case that these principles, or some of their derivative considered moral judgments, are reformulated as statements in the background theory. Suppose, for example, a statement were incorporated in the background theory that was actually of the level of generality of, say, the principles of justice. Although perhaps in disguised form, this statement would represent one of the judgments the deep theory is meant to explain. The judgment in question, and any of lesser generality it might imply, would still be derivable from the deep theory, but only because it was reiterated in that same theory.[41] And it is surely absurd to suppose that there is any interesting sense in which a statement is lent justificatory support solely in virtue of its being derivable from itself. A supporting law or theory must offer new information, a different or more inclusive way of looking at certain phenomena, than the judgments it purports to explain.

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[40] Daniels seems to have ignored or overlooked the fact that Rawls' deep theory is meant to range over principles governing all the major concepts of interpersonal morality. As such his independence constraint is construed as only applying to Rawls' principles of justice, along with the deep theory and the relevant considered judgments. See his schematic diagram on 88 and his remarks on the top of 90 of "Reflective Equilibrium and Archimedean Points".

Furthermore, apart from the obvious lack of support lent to judgments incorporated in the deep theory in the manner outlined, there is the additional question of what effect such a rigging of the theory might have on those of its implied judgments that fall outside the scope of the reiterated judgment(s). For example, suppose the principles of justice themselves were incorporated directly into the statements of the background theory. Presumably, judgments falling under the principles governing the other major ethical concepts, being in no obvious way derivable from the principles of justice, would still fall within the legitimate scope of the deep theory and so would receive something in the way of indirect justificatory support. However, on the present scenario a significant portion of our judgments concerning a prominent area of ethical enquiry would be left unexplained by the deep theory. This could only weaken the theory's claim to being a comprehensive science of ethical explanation, casting it and its derivative principles into doubt concerning their validity.[42]

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[41] This assumes that the judgment could not be derived from the deep theory once its reformulation were ommitted from the latter.

In essence, then, we are concerned that one or more of the judgments of whatever generality that are purportedly explained by Rawls' theory of human society not show up as reformulations in the premises of that same theory. More perspicuously, we can say that in terms of acceptabiliy conditions for a theory, x, and a statement purportedly explained or supported by that theory, y, for P at t:

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[42] This recapitulates the point made earlier that the fate of any statement within a proposed system of explanation is intimately related to the fate of that entire system. We might temper that point here, however, with the observation that the extent to which the status of the explanatory system in question is jeopardized is directly porportional to the level of generality of the incorporated judgment. This is because as the level of generality of that judgment becomes higher so does the volume of derivitive judgments that are cut adrift from the deep theory.

1. For x to explain or support y for P at t it must be the case that no statement of x is made acceptable for P at t solely on the basis of evidence that makes y acceptable for P at t.

from which follows

2. If a statement of x is made acceptable for P at t solely on the basis of evidence that makes y acceptable for P at t, then x does not support or explain y for P at t.[43]

Employing the above, let us amend Daniel's independence constraint as follows: Given a set of considered moral judgments, (a); a set of ethical principles (as understood to contain principles governing all the major ethical concepts), (b); and a relevant background theory, (c);

> We require that [1] (c) be constrained or supported by a wide variety of

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[43] Notice that this requirement does not prohibit from the supporting theory statements which are acceptable no matter what are the particular judgments purportedly explained or the evidence that makes them acceptable. In other words, the requirement does not prohibit tautologies from the supporting theory. Unless one is a hard-core positivist there is no reason to suppose that tautologies cannot play a role in the explanatory function of a theory. A prime example of this in the field of ethical enquiry is found in R. M. Hare's moral theory, which incorporates as a major premise his principle of universality. Hare claims that this principle is true in virtue of the logical properties of moral words. It is therefore true no matter what particular considered moral judgments we happen to hold. Nevertheless, Hare contends that this principle, along the equally tautologous one of prescriptivity, goes a long way toward identifying correct considered moral judgments. See Hare, Freedom and Reason, (Oxford: Clarendon Press, 1961), especially chapters 2-6.

> judgments from (a) and (b), each of which is independently acceptable from the others, and [2] no statement in (c) be made acceptable solely on the basis of evidence that makes acceptable judgments from (a) or (b) or any judgments purportedly explained by (c).[44]

Our discussion so far has revealed a more intricate, and I think more complete, account of Rawls' wide reflective equilibrium than that suggested by Daniels. Apart from feasibility constraints Rawls' moral system draws on a variety of ethical judgments at every level of generality by way of establishing itself as a legitimate moral science. At the level of concrete ethical encounters we have a host of considered moral judgments that identity right and wrong, just and unjust, states-of-affairs. Each ostensibly distinct class of judgments falls under, and so is derivable from, principles which govern the appropriate major concept of morality. These principles are in turn all derivable from Rawls' deep theory of human society. Consistent with Rawls' coherentist leanings no judgment at whatever level is taken as self-evident or foundational. Each judgment is subject to revisionary pressures from all other levels. A justified theory of morality is achieved when a reflective equilibriumm is reached ranging over all theoretical levels.

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[44] The last clause is meant to cover judgments which do not obviously fall into (a) or (b) but which are nonetheless part of the corpus of judgments purportedly explained by the deep theory. An example might be the right to wear the colour shirt you prefer, which right is presumably derivable from Rawls' first (liberty) principle of justice.

Unfortunately for Daniels our discussion also has shown his original formulation of the independence constraint to be inadequate to the task of ensuring the validity of Rawls' principles of justice. Daniels contends that as long as the deep theory is constrained by considered moral judgments that are disjoint from those of justice the principles of justice are supported by the deep theory. We now know that there are a variety of moral principles apart from those of justice that Rawls presumes to be derivable from his background theory. If these principles are to play their prescribed role in the justificatory structure of Rawls' wide reflective equilibrium, then each set of them must be subject to something like Daniels' independence constraint. However, each set of principles, and its corresponding considered moral judgments, must be more than simply derivable from the deep theory. For if they are to gain justificatory support from that theory (as well as lend a certain amount of support to it) they must in addition not reappear as reformulations in its premises, as is required by our revised independence constrant. In the next and final chapter I argue that Rawls theory of human society indeed violates the new independence constraint by incorporating a judgment that is of the level of generality of moral principles. The ramifications of this violation will I think provide some interesting observations concerning the nature of moral theory.

THE VEIL OF IGNORANCE AND RAWLS' RIGGED CONTRACT

In this chapter I will examine the portion of Rawls' deep theory that he offers as justification for the "veil of ignorance", whose function is to prevent the original contractors from having particular knowledge concerning the society they live in, their natural talents and propensities, and their individual conceptions of good for themselves [12-19]. I have chosen this aspect of the deep theory for two reasons. First, I believe and will argue that it violates our revitalized independence constraint. This contention, if correct, is important because the veil of ignorance represents the single most significant characteristic of the original position. Whereas others of its features perhaps could be modified or even abandoned without seriously altering the favoured choice of the contractors (the principles of justice and of the other major ethical concepts), the veil is fundamental to that choice. Rawls himself admits that without this device the bargaining problem facing the people in the original position would be hopelessly complicated, allowing of no determinable solution [140]. This observation underlies my second reason for focussing on the reasoning behind the veil. A decisive objection to this portion of Rawls' theory would deal it a serious blow as presently stated. Unless we could reconstruct his argument so as to circumvent the suggested pitfall, we would be forced to admit that the general moral conception outlined in A Theory of Justice presents a seriously flawed account of our moral sensibilities.

What, then, is Rawl's reasoning for the veil of ignorance? There are two related yet significantly different strands of argument in his book on this subject. The first is concisely expressed in the sixth of the conditions that we in chapter 2 noted Rawls maintains must be reflected in the contractors choice of principles:

> [Members of a well-ordered society] each have, and view themselves as having, a right to equal respect and consideration in determining the principles by which the basic structure of their society is to be regulated.

This highly abstract right follows from the presumption, expressed in the fourth and fifth of the aforementioned conditions, that persons are all equally moral beings. This means that they each have an effective sense of justice, as well as an understanding of a conception of their good [12, 19]. In chapter one of A Theory of Justice we are told that these considerations lead to a justification for the veil of ignorance:

> Among the essential features of the [original position] is that no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I

> shall even assume that the parties do not know their conceptions of the good or their special psychological propensities...This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles to favour his particular condition, the principles of justice are the result of a fair agreement or bargain. For given the circumstances of the original position, the symmetry of everyone's relations to each other, this initial situation is fair between individuals as moral persons ...[12]

However valid is the claim that the veil of ignorance prevents bargaining advantages to certain of the contractors, there is a basic oversight involved in characterizing it as the unique or best way of ensuring fairness between them. This is because the condition that no one be unfairly advantaged underdetermines the appropriate construal of the original position. In fact, we need only look back to Rawls' own paper, "Justice as Fairness", to find a different rendition of the initial bargaining situation that also seems to meet this condition. In "Justice as Fairness" the bargaining parties are assumed to have full knowledge of each other's talents and abilities. In addition, the following conditions are assumed to hold:

1. The contractors make decisions on the basis of enlightened self-interest, and are capable of working out the likely long-term consequences for themselves and for others of accepting certain institutional arrangements.

2. They are "sufficiently equal in power and ability" to guarantee that no one enjoys an unfair threat advantage over the others.

3. They have roughly similar, or at least complimentary, needs and interests, such that fruitful cooperation among them is possible.

4. They are non-envious: "the bare knowledge or perception of the difference between their condition and that of others is not, within limits and in itself, a sourse of great dissatisfaction."

5. The principles of justice agreed to are binding for all time.

6. Any agreement on such principles must be unanimous.[45]

The presumption underlying these conditions is that each bargaining party, cognizant of the fact that his lot will be much better in a cooperative scheme than in the case in which he is left to fend for himself, will suggest and ultimately agree to principles which he thinks everyone else is likely to accept. Two considerations prevent him from suggesting or holding out for principles that specifically benefit him to the exclusion of other peoples' interests. First, since the chosen principles are binding on all future occasions, it would be imprudent to insist on principles that benefit him under his present circumstances when he might find himself in a less favourable situation at a later date.[46] Secondly, no one else is likely to agree to principles that benefit him exclusively; and since the eventual choice of principles must be unanimous, it would be futile to suggest individually biased ones.

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[45] For the above conditions see Rawls, "Justice as Fairness", 170-171.

[46] This presumption would be undercut if the contractors were to assess alternative principles on the basis of probable benefits to themselves, given reasonable projections of their personal circumstances into the future. Rawls suggests that the contractors would likely adopt a

We can see that the above construal of the original position satisfies the condition that no one be unfairly advantaged or disadvantaged in the choice of ethical principles. Each contractor is assumed to have an equal say in the decision procedure, and so all are represented as free and equal moral persons. Unfortunately, there are numerous crippling objections to the contention that the contractors in an original position so construed would choose the principles suggested by Rawls. Regarding the principles of justice, for example, Robert Paul Wolff argues that because the bargaining parties know their own talents and abilities, there will likely be a discrepency between what the greater and lesser endowed prefer in basic distributive principles. The greater endowed might opt for a version of average utilitarianism with a rider stipulating that social and economic positions are to be filled through

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version of the maximin rule for decision-making under uncertainty, according to which the parties would reason as if each "were designing a practice in which his enemy were to assign him his place." See "Justice as Fairness", 172. But as Robert Paul Wolff points out, this assumption is inappropriate, given that each participant has full knowledge of his own and the other's circumstances, and so is actually in a position of having relatively secure knowledge regarding his likely prospects. See Robert Paul Wolff, Understanding Rawls (Princeton: Princeton University Press, 1977), 50.

competition, reasoning that their superior talents will ensure them of the more desirable positions. The lesser endowed, however, might prefer a version of the same principle that stipulates that the relveant positions are to be filled by lottery, thereby increasing their chances of occupying the more favourable positions at the cost of lowering the prospects of the least well compensated representative man. Ultimately, the parties will likely reach some sort of compromise, given the unanimous undesirablilty of the contract breaking down completely. But there is no guarantee that such a compromise would result in the contractors choosing Rawls' principles, the more controversial of which prescribes the distributionn of the relevant positions through open and fair competition, provided that the resulting economic arrangement is to the benefit of the least advantaged representative man.[47] This is of course Rawls' celebrated difference principle, and if we assume that it, along with his principle that guarantees the basic liberties for all, is the best available account of our considered judgments of justice, it is clear that he must offer another construal of the original position that is more compatible with its choice by the contractors. And again, if we assume that this other construal includes as an essential feature the veil of ignorance, said veil must be supported by a line of reasoning distinct from, or perhaps in addition to, the condition that no one have an unfair bargaining advantage.

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[47] Robert Paul Wolff, Understanding Rawls, 47-51.

Not suprisingly, then, we find another and disjoint series of arguments for the veil of ignorance in A Theory of Justice. Although presented under a variety of guises throughout the book these arguments all centre on what Rawls takes to be the impropriety of basing a system of distribution on the notion of moral desert. His first attempt at explaining this conviction draws him into a discussion of the "moral arbitrariness" of certain of our inherited talents and inclinations:

> The existing distribution of income and wealth is, say, the cumulative effect of prior distributions of natural assets -- that is, natural talents and abilities -- as these have been developed or left unrealized, and their use favored or disfavored over time by social circumstances and such chance contingencies as accident and good fortune. Intuitively, the most obvious injustice of the system of natural liberty is that it permits distributive shares to be improperly influenced by these factors so arbitrary from a moral point of view [172]. [48]

Rawls maintains that we should therefore look for a principle that nullifies the effects of the "natural lottery" [74]. The veil of ignorance, which prohibits knowledge on the part of the contractors concerning their inherited characteristics, is meant to guarantee that such a principle is adopted. With the aid of foresight we can see that the above passage is a precursor of Rawls' later arguments concerning the illegitimacy of using the notion of moral desert as a basis for the distribution of social goods. At least this is the most charitable interpretation, for the passage will not stand on its own as a justification for the veil of ignorance. No indication is given of in what sense the prior allotment of our natural abilities is "arbitrary from a moral point of view" nor how the traditional conception of natural liberty within a competitive marketplace allows distributive shares to be "improperly influenced" by it. As Nozick points out, if something is morally arbitrary simply in virtue of its not having some sort of recognizable moral justification, then all sorts of natural facts, the majority of which must inevitably influence how social goods are distributed, are morally arbitrary. That people are rational, have a certan life span, are capable of mutual communication, etc., are all morally arbitrary in this sense. But prohibiting the bargaining parties from knowledge of these sorts of facts, thus guaranteeing the nullification the effects of the natural lottery, essentially would preclude their knowing anything about themselves. This of course would render the choice problem of the original position unsolvable and pointless.[49] Therefore, if Rawls intends to use the notion of moral arbitrariness in singling out certain natural facts that are to be excluded from the knowledge of the original contractors, he must be more specific about why these facts rather than others are morally significant and why they should be prevented from directly influencing distributive shares.

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[48] Rawls represents the system of natural liberty as asserting that a basic structure which satisfies the economic principle of efficiency and in which all social positions are open to those who are willing and able to compete for them will lead to a just distribution. See TJ, 166.

It seems, then, that we must investigate Rawls' arguments concerning the notion of moral desert to get at the real substance of his reasoning for the veil of ignorance. There appear to be two main lines of debate on this topic in his book. In the first Rawls attempts to discredit the very idea that the concept of moral desert might form the basis for distributive shares. In the section entitled "Moral Desert and Legitimate Expectations" [310-315], for example, he argues that the concept of moral desert is grounded on the notion that people should be rewarded according to their intrinsic moral worth. He then contends that this idea is untenable:

> ...what [people] are entitled to is not proportional to nor dependent upon their moral worth...For example, in determining wages a competitive economy gives weight to the precept of contribution. But...the extent of one's contribution (estimated by one's marginal productivity) depends upon supply and demand. Surely a person's moral worth does not vary according to how many offer similar skills, or happen

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[49] Nozick, Anarchy, State, and Utopia, 226-227.

> to want what he can produce. No one supposes that when someone's abilities are less in demand or have deteriorated (as in the case of singers) his moral deservingness undergoes a similar shift. [311]

Here Rawls may be seem as attempting to show that the concept of moral desert is theoretically useless, that it is based on ill-founded beliefs that are liable to lead one into inconsistencies.[50] Whether this reading is correct, it is clear that a wholesale rejection of the concept of moral desert cannot by itself provide adequate justification for the veil of ignorance. By depriving the original contractors of knowledge of their particular abilities and talents the veil virtually eliminates the possibility of their choosing principles that allow the initial dispersal of natural endowments to directly influence distributive shares. Rejecting the concept of moral desert, however, eliminates only one line of argument that might support such an influence as morally permissible or correct. It does not rule out the possibility that other grounds might be found, grounds that perhaps could find expression in a defensible version of the original position, for allowing the natural lottery to play a significant role in the distribution of social goods. It might be argued, for example, that the mere fact that people display different natural endowments is morally indifferent, and that therefore any resulting inequalities should simply be ignored in the distribution of the social product.[51] Accordingly, the veil should be either eliminated or replaced with a thinner one so the contractors have knowledge of their particular abilities, with the consequence that they might well choose principles that entitle people to just that which they have acquired through the exercise of their natural endowments.[52] These principles could then be defended not by an appeal to traditional construals of the concept of moral desert, but by showing that they would be chosen by rationally self-interested individuals in a hypothetical choice situation whose salient characteristics represent acceptable moral ideals. Indeed, if such a demonstration were successful, we might end up with a reconstituted concept of moral desert, made philosophically respectable through the auspices of a suitable rendering of the original position and a corresponding background theory.

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[50] This reading was suggested to me by Wesley Cooper.

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[51] See, for example, David Gauthier, "Justice and Natural Endowment: Toward a Critique of Rawls' Ideological Framework", Social Theory and Practice, 3 (1974), 15-16. Gauthier, however, does not suggest that the circumstances of the original position should therefore be altered, as I do below.

[52] We noted in our discussion of the version of the original position offered in "Justice as Fairness", in which there is no veil of ignorance, that there is a multitude of possible choices that might be agreed to by the contractors. There is no prima facie reason to suppose that they would not choose principles that entitle people just to the fruits of their developed natural abilities. The same would seem to be the case with other versions of the original position in which thinner veils than that advocated in A Theory of Justice are incorporated, as long as the contractors are allowed knowledge of their particular characteristics.

All this shows is that the discrediting of one possible line of defense for a distributive process in which the natural lottery plays a significant role cannot legitimize the veil of ignorance, which unconditionally prevents the contractors from sanctioning such a process. Rather, what is required is an argument with normative force that implies that all possible defenses for the distributive scheme in question are invalid. Such an argument would in effect establish that it is morally impermissible to allow distributive shares to be largely determined by the original allotment of natural endowments. With this in mind, let us examine Rawls' second line of argument cocerning the notion of moral desert, which is succinctly expressed in the following passage:

> It seems to be one of the fixed points of our considered judgments that no one deserves his place in the distribution of natural endowments, any more than one deserves one's initial place in society. The assertion that a man deserves the effort to cultivate his abilities is equally problematic: for his character depends in large part upon fortunate family and social circumstances for which he can claim no credit. Thus the more advantaged represemtative mam cannot say that he deserves and therefore has right to a system of cooperation in which he is permitted to acquire benefits in ways which do not contribute to the welfare of others. There is no basis for this claim. [104]

We can see that Rawls is here offering an argument with normative force as justification for the veil of ignorance.[53] In fact he is making a direct appeal to what he takes to be a firm moral conviction on the reader's part in framing that argument. No one has a right to the exclusive benefit of his natural endowments because the only instance in which he could legitimately claim that right, viz., that in which he deserves his natural abilities and social position, is morally untenable. The veil of ignorance prevents the original contractors from choosing principles that would grant the right in question, and is therefore justified. Curiously, this line would seem to suggest that if we did deserve our inherited qualities, we would have the right to exploit them for our own benefit. This flatly contradicts the theme of the argument we just finished exploring, which is that the very notion of moral desert is unintelligible. Be that as it may, the argument we are now considering contains a non-sequitur. Rawls claims, not implausibly I think, that no one deserves his inherited endowments. It does not follow, however, that no one deserves and therefore has a right to a system of cooperation in which he can exploit his natural gifts in ways which do not contribute to the welfare of others. This would only be the case if the basis on which someone may be said to deserve something must itself be deserved. But this is not normally how desert claims work. When we say that the poor deserve our help we do so not because we believe that they deserve to be poor. Nor does the Marxist slogan, "to each according to his need", depend upon a conviction that certain people deserve to be in need. The point is that rather than step into an infinite regress in desert claims it is customary to stop at a certain characteristic or group of characteristics that is thought to be morally relevent and proclaim it a prerequisite simpliciter for legitimate claims. Thus the poor are said to deserve our help, not because they deserve to be poor, but because they are poor. Rawls employs the same type of reasoning in arguing that people are entitled to equal consideration in the design of their societal institutions on the basis of their capacity to be moral persons [504-512]. This "range property" is not presumed to be deserved. It is merely something which all or most people possess and which Rawls believes is a reasonable characteristic in virtue of which they can be said to be entitled to equality in the design of their institutions.[54]

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[53] This might seem a contentious point given Rawls' claim that the above passage is merely a clarification of the nature of his difference principle. See TJ, 104. However, on 15 he clearly refers to the alleged illegitimacy of natural desert claims as part of the reasoning for the description of the original position. Also, on 310-315 he defends his proposed principles of justice on the grounds that they do not reward people on the basis of their inherited endowments (see especially 311). Since all arguments for the principles of justice are properly viewed as deductions from the circumstances of the original position (apart from the principles' match with our considered moral judgments), the moral judgment that people should not reap the exclusive benefit of their inherited endowments must also be regarded as a defense of the description of the original position, and specifically of the veil of ignorance.

We seem, then, to have caught Rawls once more in an inconsistency. Moreover, there is another reason why the present argument cannot establish the validity of the veil of ignorance. For Rawls has again pursued a line that at best could establish only that one possible defense for a distributive process in which the natural lottery plays a direct role is incorrect. Even if the conviction that he appeals to did imply that no one deserves (i.e., in the traditional sense of deserve) the exclusive benefit of his natural endowments there are likely other possible moral defenses for the distributive process in question, as we have indicated above. It appears, therefore, that we must continue our search in Rawls' book for an argument that conclusively establishes the direct influencing of distributive shares by the prior allocation of natural endowments as morally impermissible.

I believe that Rawls employs just such an argument, but to prepare the ground for my suggestion we must first consider what he has to say about the origins of the need for a theory of justice. In chapter one he says:

> Let us assume, to fix ideas, that society is a more or less self-sufficient association of persons who in their relations to one another

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[54] In my brief analysis of desert claims I mainly follow Les Holborow in his "Desert, Inequality, and Injustice", Philosophy, vol. 50 (1975), especially 160-161.

> recognize certain rules of conduct as binding and who for the most part act in accordance with them...A set of principles is required for choosing among the various social arrangements which determine [the] division of advantages and for underwriting an agreement on the proper distributive shares. These principles are the principles of justice: they provide a way of assigning rights and duties in the basic institutions of society and they define the appropriate distribution of the benefits and burdens of social cooperation. [4]

Those of a Lockean persuasion might think it strange that a theory of justice should begin with the problem of distributing the products of social cooperation, for such a theory has nothing to say about the instance in which someone has acquired certain goods or a means of sustanance solely through his own eforts. Nozick, for example, thinks it pertinent that we consider a scenario in which there are ten Robinson Crusoes, each working alone for a number of years on separate islands, who discover the existence of each other and the state of their different holdings by means of conveniently revealed radio transmitters.[55] Nozick contends that despite any claims some of the less well off men might make on the others it is perfectly clear that each is entitled only to that which he has acquired soley through his own efforts. He then asks an interesting question concerning views such as Rawls', in which justice begins with the proper distribution of the total social product:

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[55] Nozick, Anarchy, State, and Utopia, 185.

> How does social cooperation change things so that the same entitlement principles that apply to the noncooperative cases become inapplicable or inappropriate to cooperative ones? It might be said that one cannot disentangle the contributions of distinct individuals who cooperate; everything is everyone's joint product. On this joint product, or on any portion of it, each person plausibly will make claims of equal strength; all have an equally good claim, or at any rate no person has a distinctly better claim than any other. Somehow (this line of thought continues), it must be decided how this total product of joint social cooperation (to which individual entitlements do not apply differentially) is to be divided up: this is the problem of distributive justice.[56]

Nozick goes on to point out that given the very precepts of Rawls' position the contention that individual contributions cannot be disentangled from the joint social effort is untenable. For Rawls' difference principle requires that inequalities are justified only if they serve to raise the expectations of the least advantaged representative man in society, so long as without these inequalities his prospects would be even lower. Part of the very reason for allowing such inequalities is so as to provide incentives for the more talented to do things which improve the long-term prospects of the less well endowed [188]. But this can only be accomplished if it is known for whom to provide the incentives and whether or not the resulting incremental gain to the joint social product offsets the expenditures represented by the incentives. This of course presupposes that individual contributions to the social effort can to some degree be identified.[57]

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[56] Nozick, Anarchy, State, and Utopia, 156.

Supposing for the moment that Rawls would agree with Nozick's contention that people are entitled to that which they have gained solely through their own efforts, which the Robinson Crusoe scenario is meant to illustrate, how could he respond to Nozick's challenge that since individual contributions can be identified the principles of social justice should merely extrapolate on the theme of individual entitlements? As if prompted by this challenge Rawls, in a post-Theory of Justice paper, writes that

> A theory of justice cannot take [individuals'] final aims and interests, their attitude to themselves and their life, as given. Everyone recognizes that the form of society effects its members and determines in large part the kind of persons they want to be as well as the kind of persons they are...Nor similarly, can we view their abilities and talents as fixed natural gifts, even if there is an important genetic component. These abilities and talents cannot come to fruition apart from social conditions and as realized they always take but one of many possible forms...So not only our final ends and hopes for ourselves but our realized abilities and talents reflect, to a large degree, our personal history, opportunities, and social position. What we might have been had these things been diferent, we cannot know. [58]

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[57] Nozick, Anarchy, State, and Utopia, 188-189.

[58] Rawls, "The Basic Structure as Subject", American

We can see that Rawls has taken Nozick's conjecturing a giant step further. Apart from the individual effort each puts toward the total social product, there is the further question of what portion of an individual's actual abilities can properly be viewed as his only. Rawls claims that none of the talents people display within a social setting, nor their very personalities, can be described as theirs by nature. It is unclear, however, what we are to conclude from this. Are we to follow Nozick's suggestion and suppose that this further entangling of individual contributions entails that everyone has by default an equal claim on the joint social product? For an answer to this question we must return to the first chapter of A Theory of Justice:

> The intuitive idea is that since everyone's well-being depends on a scheme of cooperation without which no one could have a satisfactory life, the division of advantages should be such as to draw forth the willing cooperation of everyone taking part in it, including those less well situated. Yet this can be expected only if reasonable terms are proposed. The two principles [of justice] mentioned seem to be a fair agreement on the basis of which those better endowed, or more fortunate in their social position...could expect the willing cooperation of others when some workable scheme is a necessary condition of the welfare of all. Once we decide to look for a conception of justice that nullifies the accidents of natural endowment and the contingencies of social circumstances as counters in the quest for political and enonomic

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Philosophical Quarterly, 14 (1977), 160. For an explicit discussion of the social contribution to our talents and personalities see TJ, 104.

> advantage, we are led to these principles. They express the result of leaving aside those aspects of the social world that seem arbitrary form the moral point of view. [15]

Rawls is not here claiming that there is or could be a genuinely voluntary agreement among society's members to participate in a scheme of cooperation. To be sure it is one of his concerns to establish that a stable society is one in which everyone accepts and knows that others accept the same conception of justice [453-454]. But as his comments quoted above concerning the social contribution to our personal characteristics indicate, whether we should take part in society itself is not a matter of choice. We are already participants and to some degree products of our social environment; any questions concerning whether we agreed to accept its influence or could voluntarily return to a prepolitical state are therefore spurious.[59] Rawls is rather saying that since the pursuit of a person's well-being necessarily involves the cooperation of others, society as a whole has a right to compensatory benefits. This is just to say that society has a legitimate claim to at least a portion of the social goods produced through his labour. Extrapolating, we may say that since the individual talents and abilities that have accrued to different persons have been "shaped" or brought to fruition through the cooperation of others, society has a right to view these talents as "social assets" to be used for the common good.[60] Rawls' theory of justice does not, therefore, rest on the assumption that through default all have an equal claim to the joint social product, but on the more specific normative claim that may be expressed as follows: It ought to be the case that those of an individual's endowments that have been acquired or developed through social cooperation be exploited in ways which benefit society as a whole.[61]

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[59] A fact that is reflected in the original contractors' presumption that their membership in society is given. See Rawls, "The Basic Structure as Subject", 162.

Here we have the basis of an argument of the form we earlier established as being necessary to an adequate defense of the veil of ignorance. Since people's socially developed talents and abilities ought to be employed in such a manner as to further the common good it is morally impermissible that they should exclusively enjoy that which they have acquired through the use of these same abilities. Put in terms of the original position we may say that given the claim society has on people's endowments the contractors must be prevented from choosing principles that allow the natural, or perhaps better, the social lottery, from directly influencing distributive shares. By depriving the contractors of knowledge of their particular endowments the veil ensures that they will not choose such principles. Indeed it virtually guarantees that their choice will in some sense require people's abilities to be harnessed for the common good of society.

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[60] On the notion of viewing natural attributes as social or common assets see TJ, 101-102, 107-108.

[61] This might offer Rawls a response to Nozick's claim that it is obvious that each of his Robinson Crusoes is entitled to just that which he has acquired through his own efforts. Rawls could perhaps rejoin that if all of the stranded men were formerly of the same society then their abilities, and therefore their holdings, are to some extent public property.

Of course however plausible this line of justification for the veil of ignorance is it must still meet ou[illegible] independence constraint. In chapter two we stated this constraint as follows: Given a set of considered moral judgments, (a); a set of ethical principles, (b); and a relevant background theory, (c);

> We require that [1] (c) be constrained or supported by a wide variety of judgments from (a) and (b), eacch of which is acceptable indendently from the others, and [2] no statement in (c) be made acceptable solely on the basis of evidence that makes acceptable judgments from (a) or (b) or any judgments purportedly explained by (c).

With respect to condition [2] let us consider Rawls' statement of the general conception of justice of which his two principles are a special case:

> All social values--liberty and opportunity, income and wealth, and the bases of self-respect--are to be distributed equally unless the unequal distribution of any, or all, of these values is to everyone's advantage [62].

I believe it can be shown that this general conception of justice is essentially equivalent to the conviction we have attributed to Rawls as justification for the veil of ignorance. This is a significant claim for if it is true Rawls would seem to have flagrantly violated the second condition of our independence constrant. For it would be the case that the underlying conception of justice that yields his two more celebrated principles is merely a reformulation of a premise in his background theory.[62]

To start with we should note why it is that the expression of Rawls' general conception of justice cited above does not admit of a ready translation into the conviction we have identified as Rawls' defense for the veil. The first problem is that the general conception specifies social values as the goods that are to be distributed in a certain manner. Conversely, the conviction we have been considering requires only that all of our (socially influenced) talents and abilities be exploited for the common good, implying that everything we enjoy as a result of the exercising of our endowments must be distributed so that everyone will benefit. But this will surely include certain goods that we normally think of as falling outside the category of social goods. A case in point might be my ability to touch my nose with the tip of my tongue. This talent is at least partially a result of historical social contingencies, but seems an unlikely candidate for a social value. Rawls acknowledges such cases in distinguishing between social and natural *primary* goods. In general primary goods are things every rational individual is presumed to want [62]. With more of these goods people can in most cases be assured of a better chance of securing their ends, whatever they may be [92]. The primary *social* goods are publicly distributable advantages such as rights and liberties, power and opportunity, income and wealth [92]. The primary *natural* goods are things like health and vigor, intelligence and imagination; "although their possession is influenced by the basic structure,they are not so directly under its control [62]." Presumably, if natural goods *were* directly controllable by the basic structure, they *would* be subject to Rawls' general conception of justice. Indeed, if such goods were publicly distributable they would *just be* social goods. But this means that Rawls' general conception is essentially not at variance with the conviction under discussion on the issue of which goods are to be distributed in a certain way. For the one reasonable interpretation of that conviction would have it that only those of our endowments that *can be* exoloited for the common good, i.e, those which can be employed in the production of *social goods*, should be so utilized. All that is in question is *which* of our abilities can be enlisted in the manner described.[63]

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[62] There are problems with identifying such a reformulation as a violation of the independence constraint that I will leave until the end of this section to explore. Let it suffice for now to note that it is unclear whether a principle of distribution that actually only represents an early stage in the calculations of the original contractors should be required to meet an independence constraint.

There is another problem, however, that concerns the stipulation in Rawls' general conception of justice that social goods are to be distributed *equally* unless an unequal distribution will benefit everyone. The moral conviction we have been considering makes no such stipulation. It requires only that all of society's members benefit from the distribution of social goods. To facilitate a more precise comparison between the two prescriptions, let us assume, as does Rawls, that the relevant sense in which society as a whole can be said to benefit from a particular distribution is that in which the advantage of the least well off representative man is secured.[64] According to Rawls there is one other natural sense of the phrase "to everyone's advantage", which can be expressed as that which is required by the economic principle of efficiency as applied to the basic structure of society [65-71]. However, the interpretation of his general conception of justice that focusses on the expectations of the least well off representative man in society is favoured because it constitutes the maximin solution to the choice problem of the original contractors [152-158], and because it represents a conception of justice that is compatible with the formal conditions of publicity and finality (rendering it a stable conception)[175-183]. Concerning a similar interpretation of the claim we have attributed to Rawls as a defense for the veil of ignorance, we will recall that it is based on the conviction that the division of advantages should be such as to elicit the willing cooperation of all members of society, including those less well situated. It is obvious, first of all, that a distributive principle that requires that the pattern of social allocation benefit the least advantaged representative man furthers the interests of those less well favoured. But it also can be justified to the better endowed on the grounds that they will gain special advantages in the form of incentives to improve the lot of those worse off, which advantages could not be fairly gained except through the willing cooperation of that same group.[65] If to this we add the assumption that in a society governed by such a distributive principle raising the expectations of the least advantaged man accordingly raises everyone's prospects (this assumes that chain-connectiveness and close-knitness hold [80-83]), then the prescription that the the division of social advantages should benefit the least advantaged representative man seems a natural enough interpretation of the claim that socially influenced abilities and talents should be exploited for the common good.

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[63] Rawls points out that since his principles of justice require that society benefit from the prior distribution of natural talents and abilities the question arises as to whether eugenic policies should be adopted to ensure that people have greater natural assets. He conjectures that given an upper bound on abilities we might eventually achieve a society in which people have the greatest equal liberty and the greatest equal talent [108]. For an interesting discussion of the extent to which social means of nuturing natural abilities could and should be employed in an ideal and perfectly just society see Wesley E. Cooper, "The Perfectly Just Society", *Philosophy and Phenomenological Research*, vol. 38 (1977).

[64] For a discussion of the concept of representative men in society see *TJ*, 95-100.

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[65] See TJ, 103, where Rawls offers a similar argument in defense of the version of his difference principle that focusses on the prospects of the least well advantaged representative man.

The task, therefore, is to identify the situation(s) in which there is no alternative to a system of equal distribution that will increase the prospects of the least advantaged man, in which case Rawls' general conception, presumably in contradistinction to our other distributive principle, will require that the system of equal distribution obtain. Only then will we have a clear understanding of how the two prescriptions differ in their requirements. It is immediately apparent, however, that the state-of-affairs just described would be very rare. For in any society in which there is a discrepancey in the degree to which different people are advantaged by their natural endowments there is always a possible alternative system of distribution in which the expectations of the least advantaged represenative man are greater than that in a condition of distributive equality.[66] Such a system will offer incentives to the better endowed to produce conditions that raise the expectations of those less well off. These incentives will increase the prospects of the better endowed above those of the less priviledged, but this is a necessary inequality if the position of the least advantaged representative man is to be improved. Indeed even in a condition of equality concerning the extent to which people are advantaged by their natural endowments there will be an alternative system of distribution that benefits everyone, as long as it is possible to improve the natural assets of all or any of the members of society.[67] If we continue this line of reasoning it becomes apparent that the only instance in which incentives cannot be employed so as to raise the expectations of the least well off representative man is that in which all members of society have the greatest equal talents. We can imagine such a state-of-affairs resulting from a consistent application over a number of generations of a policy of genetic engineering geared toward endowing people with greater natural assets. In such a society there would be no need for inequalities arranged so as to maximize the expectations of any representative man, for he will

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[66] Unless, of course, the expenditure represented by incentives for the well endowed is more costly than the

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resulting incremental gain to the least advantaged representative man, or the more well endowed can be persuaded to work to their capacity for the common good without receiving compensatory advantages.

[67] As Cooper puts it, there is a progression in the requirements of ideal political theory toward the situation in which all are maximally and equally well advantaged. See Cooper, 55.

already have been endowed with the greatest possible natural talents. But then in this situation, which is the *only* one in which the equality rider in Rawls' general conception of justice comes in to play, the two prescriptions we have been discussing will be in perfect accord in their requirements. For the prevailing condition in which all are maximally and equally well endowed would *just be* to the advantage of the least well off representative man, who would in effect be *any* and *all* of the representative men in society.

We have shown, therefore, that the conviction we have designated as Rawls' justification for the veil of ignorance and the general conception of justice that he claims would be chosen by the original contractors are essentially the same in all relevant respects. For we have establised [1] that they both single out *social goods*, whatever they turn out to be, as the proper subject of distributive principles of justice, and [2] that under the only circumstances in which there is a *prima facie* possibility that they might prescribe differently they in fact require that the same distributive pattern prevail. This is a significant, for it entails that the general moral principle that is yielded by the original position is actually reformulated as an essential premise in the background theory that determines which conditions are to hold in that same theoretical construction.[68]

It might be objected, however, that the above does not conclusively establish that Rawls has violated the independence constraint. For the second condition of that constraint, which is the one we are most concerned with, basically requires that none of the judgments of whatever generality that are explained or supported by the deep theory show up as reformulations in the premises of the same theory. However, the objection continues, Rawls' general conception of justice, which we have shown to be virtually identical to the reasoning behind the veil of ignorance, is not part of the body of judgments the deep theory is meant to explain. It is rather merely a stage in the deliberations of the original contractors, who eventually arrive at a much more specific conception, which is composed of two very specific principles. This conception, the objection concludes, is the one we are to measure against our considered judgments of justice. It is therefore this conception that we should attend to if we are to uncover a genuine violation of the independence constraint.

To reply to this objection it is necessary to examine

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[68] We established at the beginning of this chapter that the veil of ignorance, as opposed to some of the other aspects of the original position, is necessary to the contractors' arriving at a determinate solution to their choice prrroblem. This in turn entails that the inclusion of the veil is essential to the derivation of both his general conception and his two more specialized principles of justice.

Rawls' notion of "ideal" as opposed to "nonideal" political theory. In the section of his book entitled "The Priority of Liberty Defined" he says:

> The intuitive idea is to split the theory of justice into two parts. The first or ideal part assumes strict compliance and works out the principles that characterize a well-ordered society under favourable circumstances. It develops the conception of a perfectly just basic structure and the corresponding duties and obligations of persons under the fixed constraints of human life. My main concern is this part of the theory. Nonideal theory, the second part, is worked out after an ideal conception of justice has been chosen: only then do the parties ask which principles to adopt under less happy conditions.

As this passage indicates, Rawls believes that ideal theory is the fundamental part of the theory of justice. This view is based on his conviction that isolating the prominent features of an ideal and perfectly just society will provide a standard against which we can measure the relative justice of societies operating under less favourable conditions [246]. Departure from the ideal conception of justice, which is represented by Rawls' two lexically-ordered principles [62, 151, 245, 303], is justified to the extent that it can be shown that the material conditions of society do not permit its adoption, and that the nonideal conception that is to supplant it, Rawls' general conception [63-64, 247, 303], provides for its eventual ascension. In this way the ideal conception represents the long-term tendancy of a just system [248].

It is obvious at this point that Rawls' general conception is more that just an initial stage in the deliberations of the original contractors. For it is meant as a normative first principle when circumstances are less than ideal. Its significance goes beyond this, however, because as noted earlier Rawls' two principles themselves are a special case of the general conception, to be upheld only when circumstances permit. Viewed in this manner we can see that the general conception is the basic normative component of the choice of the original contractors, generalizing over both ideal and nonideal circumstances. Which interpretation of this conception is appropriate to a particular society is completely circumstance-dependent.[69]

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[69] The fact that the specific form the general conception is to take is circumstance-dependent poses, I think, a dilemma regarding how Rawls is to construe the constraints on the knowledge of the original contractors. On the one hand, if the contractors are to know that ideal conditions obtain in their society, which is the interpretation Rawls usually favours [152, 145, 245f, 542], they might well choose his two specialized principles, but they will have no motivation to establish a general conception of justice for societies that operate under less favourable conditions. Since their well-being, and that of their immediate descendants, will have been secured, they will be indifferent as to the design of the basic institutions of less fortunate societies. On the other hand, if the contractors have no knowledge of the material conditions of their society, which Rawls sometimes assumes when considering questions of justice between generations [137], they will most likely endorse the general conception of justice and leave its precise interpretation until after the veil of ignorance is lifted. They will not choose Rawls' two principles, for given the constraints on their knowledge of particulars they will avoid agreeing on any conception that is circumstance-dependent. Offhand, it seems that in order to provide a normative standard for both ideal and nonideal societies Rawls should favour the version of the veil under which the contractors are totally ignorant

With the above we can properly respond to the objection that we have not successfully established a violation of the independence constraint because the principle we have identified as being reformulated in the deep theory is not part of the body of judgments that theory is meant to explain or support. If Rawls were exclusively concerned with providing an ideal conception of justice this objection might carry some weight. However, we have seen that in addition to arguing for a circumstance-dependent ideal conception he establishes a more general one that is formulated so as to apply to all societies at whatever level of advancement. As such this latter conception is a significant part of Rawls' substantive moral theory and so must be tested against our considered moral judgments.[70] Our charge that Rawls has rigged the original contract, then, holds.

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of their particular society's conditions. But then he would be forced to admit that his special conception of justice, which demands the priority of equal liberty for all over economic concerns, cannot be derived solely from the circumstances of the original position, but is rather largely dependent upon empirical considerations. This would seem to place him closer to the utilitarian camp than he would like, for they typically argue for the basic liberties on the grounds that given certain social conditions, namely, that people have a strong preference for these liberties, it would best serve the collective or average interest to uphold the fundamental freedoms.

[70] It is not clear how well the general conception would fare in this respect in some of its more extreme interpretations. For example, if a society based on serfdom were to the advantage of the least well off representative man, given unfortunate social circumstances, would we acknowledge it as just?

Although I believe the above shows that Rawls' reasoning for the veil of ignorance violates the independence constraint, there is another method of establishing this that does not rely on the specific content of the purportedly reformulated judgment. Since this method offers a more general strategy for discovering infractions of the independence constraint, thereby providing the means of assessing other aspects of Rawls' deep theory, I will pursue it here. We will first recall that in chapter two of this essay we noted that a distinctive feature of considered moral judgments is that they make reference to empirically specifiable states-of-affairs, or as in the case of low-level generalizatons, they refer to easily identifiable sets of such states-of-affairs. Rawls' ethical principles, though of a much higher level of abstraction, also refer to empirically identifiable ethical situations, and so are directly testable against our considered moral judgments concerning these situations. His first principle of justice, for example, prescribes that everyone have the most extensive system of basic liberties that is compatible wih a like system for everyone else. Presumably, situations in which the basic liberties are upheld are empirically identifiable; otherwise the principle would be of no use as part of a publicly recognizable standard of justice. But now is it the case, or perhaps better, should it be the case, that the statements in Rawls' deep theory are likewise directly testable against our considered moral judgments?

This last question speaks to a standing issue on the subject of theory identification in general. That is the proposed distinction betwen lawlike statements and theoretical ones. In philosophy of science, for example, it is generally agreed that there is a distinction to be made between laws and theories in that laws contain only terms that refer to observables or are operationally definable, whereas theoretical statements contain at least some terms that do not refer to observables and are not operationally definable. In other words, scientific laws are held to be immediately intelligible and testable because they refer to everday objects or specific experimental operations, while theoretical statements, which contain terms whose referents are not overtly discernable (such as "electrons", "space curvature", and "electromagnetic wave") are not. Whether one takes the putative dissemblance between laws and theories to mark a basic logical distinction or merely a pragmatic one, it seems clear that it has vague boundaries and may be relative to the sophistication of the observer. For example, the term "the mass of the electron" is theoretical if any term is, yet it is in a sense operationally definable since one can specify experimental situations in which electrons are present and one can measure their mass. On the other hand, sulfuric acid, which seems a likely candidate for an observable, is clearly not one for somebody ignorant of chemistry.

Despite the vagueness of the proposed distinction between lawlike and theoretical statements it remains an important and useful one. Many of the most well established and fruitful of contemporoary scientific theories clearly display the characteristics definitive of theoretical statements, and the obverse is true concerning the majority of purportedly confirmed experimental laws and their identifying features. Indeed, it is partly due to the fact that scientific theories are couched in terms that do not allow of direct confirmation by definite observational procedures that they are capable of explaining a wide variety of experimental laws and can thus deal with an extensive array of materials that are qualitatively dissimilar. Add to this the fact that scientific laws and theories are primarily addressed to an identifiable community with relatively similar conceptions of the observable (i.e., the scientific community) and the difficulties noted above no longer seem decisive.[71]

Returning to Rawls' deep theory of human society, it is clear that he means it to conform to the general description we have designated for theoretical statements. For as he says in "Reply to Alexander and Musgrave",

> The *aim* of the description of the

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[71] In my characterization of the putative distinction between lawlike and theoretical statements I mostly follow Mary Hesse, "Laws and Theories", *Encyclopedia of Philosophy*, vol. 4 (1967), and Earnest Nagel, *The Structure of Science*, chap. 5, "Experimental Laws and Theories", 79-106.

> original position is to put together in one conception the idea of fairness with the formal conditions expressed by the notion of a well-ordered society, and then to use this conception to help us select between alternative principles of justice. A striking feature of the preceeding account is that we have not said anything very specific about the content of the principles of justice in a well-ordered society. We have simply combined certain rather formal and abstract conditions.[72]

It is not suprising that Rawls wants his background conception or theory not to specify the content of the principles of justice, for his argument from the original position would be patently circular if he did. In fact the incorporation of any statement(s) in his deep theory that describes certain empirically identifiable situations as right or wrong, just or unjust, would be highly suggestive of such circularity. A quick check of the statements he overtly acknowledges as constitutive of the theory of moral persons, which is the primary normative constituent of his deep theory, shows that they do not contain such descriptions and so are not directly testable against our considered moral judgments. These statements are the following:

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[72] Rawls, "Reply to Alexander and Musgrave", 638. The emphasis is mine. A further specification that the conception of a well-ordered society not describe a specific content for the principles of justice can be found in Rawls, "Kantian Constructivism", 522. This specification can also be found in terms of Rawls' contention that the bargaining problem represented in the original position is an example of pure procedural justice. See TJ, 120, 136. For this to be the case the parties in the original position cannot be bound in their deliberations by any antecedently given ethical principles. The principles chosen must therefore be solely the result of a correct or fair decision procedure, unbiased by independent moral considerations. See TJ, 86. For a detailed account of the relationship between Rawls' theory of pure procedural justice and the decision problem generated by the circumstaces of the original position, see Rawls, "Kantian Constructivism in Moral Theory" 523-524.

1. The members of a well-ordered society each have, and view themselves as having, a sense of justice that is normally effective.

2. They each have, and view themselves as having, fundamental aims and interests in the name of which it is legitimate to make claims on one another in the design of their institutions.

3. They each have, and view themselves as having, a right to equal respect and consideration in determinimg the principles by which the basic structure of their society is to be regulated.

None of the above statments specifies that certain kinds of recognizable states-of-affairs are right or wrong, just or unjust. They merely describe certain highly abstract features of moral persons that through the auspices of the choice of the original contractors imply that particular sets of ethical principles, and consequently particular sets of our considered moral judgments, are acceptable or correct.[73]

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[73] With the exception of Rawls' strong publicity condition his formal constraints presumably also do not pass judgment on particular sorts of empirically identifiable ethical situations. The strong publicity condition requires, among other things, that people be aware and accept that the principles of justice that are to regulate the basic structure of society are founded on reasonable beliefs that have been established by generally accepted means of inquiry. See _TJ_, 133. This constraint _does_ describe certain empirically identifiable situations as wrong or unjust, e.g., those in which the principles that actually regulate societal arrangements are not known to do so by society's members, as might conceivably be the case in a

Unfortunately for Rawls this is not the case with the reasoning we have ascribed to him for the veil of ignorance. That reasoning is expressed in the statement that it ought to be the case that those of an individual's endowments that have been acquired or developed through social cooperation be exploited in ways which benefit society as a whole. This statement does describe a particular kind of state-of-affairs as wrong or unjust. That is the situation in which someone employs those of his talents, abilities, or social position that have been socially influenced to advance exclusively his own position or that of a sub-group of society. And since it is Rawls' contention that all personal endowments are socially influenced, the states-of-affairs in which this kind of immoral act is instantiated are empirically identifiable.[74] Rawls' reasoning for the veil of ignorance, therefore, does apply to empirically identifiable situations, and so is directly

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society regulated by the principle of utility in which the citizens believe that something like Rawls' principles are the ultimate arbiters of justice. It is likely, therefore, that the strong publicity condition violates the independence constraint. This is likely also the case with Rawls' reasoning behind the contractors' taking the basic structure as the subject of the principles of justice, as this reasoning is essentially the same as for the veil of ignorance (which I argue below violates the independence constraint). See Rawls, "The Basic Structure as Subject", especially 160-161.

[74] This also assumes that it is ascertainable as to who in society benefits from a person's endowments being employed in a certain manner. As we noted during our discussion of Nozick's Robinson Crusoe scenario, Rawls' difference principle is predicated upon this very assumption.

testable against our considered moral judgments. Accordingly, his deep theory of human society incorporates a statement of the level of generality of ethical principles.[75]

In this chapter we have examined Rawls' purported reasoning for the veil of ignorance in an attempt to uncover a violation of the independence constraint. Having rejected his ostensible arguments for various reasons, we ascribed to him a more plausible defence that is implicit in his remarks on the inherently social nature of the theory of justice. We then pursued two different approaches to establishing this defense as violating the independence constraint. In the first, we showed that the moral judgment underlying Rawls' reasoning for the veil is literally a reformulation of his general conception of justice, and then showed that this conception is a significant part of his substantive theory. In the second approach we identified a general feature which if displayed by a judgment incorporated in the deep theory indicates a violation of the independence constraint. More specifically, we showed that the incorporation of a judgment in the deep theory that makes reference to empirically identifiable states-of-affairs points to such a violation. We then established that the moral conviction Rawls relies on for his defense of the veil displays the feature in question. As noted earlier, the second of the above approaches offers a more general strategy for discovering violations of the independence constraint. This is because the incorporation of _any_ judgment in the deep theory, regardless of its content, that refers to empirically isolatable situations marks a violation. But we may also observe here that this "general" approach offers some insurance against the possibility that we were mistaken as to the viability of Rawls' ostensible arguments for the veil. For example, if it turned out that his contention that people do not deserve their natural endowments can offer at least a _prima facie_ justification for the veil, he would still have violated the independence constraint. For this judgment does refer to an empirically isolatable state-of-affairs, i.e., that in which people possess characteristics that have accrued to them through the effects of the natural lottery.

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[75] Here we must establish the conviction we have ascribed Rawls as the reasoning for the veil of ignorance as not being a tautology. For as we noted in chapter two, tautologies are not affected by the independence constraint. The first thing to observe in this context is that the conviction in question does not look like a tautology. That is, it does not seem as though it is true in virtue of logical form that it ought to be the case that those of an individual's endowments that have been acquired or developed through social cooperation be exploited im ways that benefit everyone. Second, its negation would not seem to imply a contradiction. In fact, any historical entitlement theory of justice-in-holdings, such as Locke's or Nozick's, is bound to embrace its negation. However much one might disagree with these theories he would be hard-pressed to show that they are self-contradictory.

CONCLUDING REMARKS

In my final remarks I would like to offer an explanation of sorts of how Rawls could have fallen into the trap of explanatory circularity I have charged is engendered in his characterization of the original position. In this context I will examine the two basic justification procedures he employs to establish his substantive moral theory, namely, the procedure of reflective equilibrium amd the social contract mechanism represented by the original position, so as to reveal what I believe is an underlying tension in his approach to ethical theory construction. What will result is a reinterpretation of the role of the social contract within a roughly scientific methodology for justifying moral theories. I will then consider two objections to the view I propose that are suggested by some of Rawls' remarks on certain pragmatic aspects of ethical theory. These objections challenge the force of my own criticism that Rawls has violated an appropriately construed independence constraint. In the course of answering them I hope to further clarify the implications of Rawls' methodological stance.

To begin with we will recall that in his book Rawls offers two ostensibly different arguments as to why we should accept the solution to the choice problem represented by the circumstances of the people in the original position as constituting the correct conception of justice. One is that the original position embodies conditions on the principles of justice that we can all accept. Thus,

> One argues from widely accepted but weak premises to more specific conclusions. Each of the [premises] should by itself be natural and plausible; some of them may even seem innocuous or trivial. The aim of the contract approach is to establish that taken together they impose significant bounds on the acceptable principles of justice. [18]

The other argument is that the principles that would be chosen in the original position match our considered judgments in reflective equilbrium, which we have seen is meant to apply to all three levels in the deductive heirarchy of Rawls' general theory of human (moral) society. It is interesting to note that each of these methods of establishing the correct principles of justice receives careful and isolated attention in earlier articles by Rawls. In his 1957 paper "Justice as Fairness" we find the first mention of a hypothetical contract embodying publicly acceptable conditions on a conception of justice. Through such a contract it is presumed that people can justify to themselves and to each other a coherent set of principles of justice.[76] Conversely, in "Outline of a Decision Procedure for Ethics", published in 1951, we find the view that an ethical theory is properly viewed as a heuristic explication of the considered judgments of competent moral judges:

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[76] Rawls, "Justice as Fairness", especially 182-183. Rawls does remark that the principles arrived at through the auspices of the contract in question are only acceptable to the extent that they are embodied in the judgments made by competent judges upon deliberation and reflection. He does

> The...objective...in the development of the present method is to discover and formulate an explication which is satisfactory, by and large, over the total range of the considered judgments of competent moral judges as they are made in day to day ordinary life, and as they are found embodied in the many dictates of common sense moraliy, in various aspects of legal procedure, and so on...[T]he explication of these judgments is designed to be a heuristic device for discovering reasonable principles. Therefore, while explication is an empirical inquiry, it is felt that it is likely to be a way of finding reasonable and justified principles in view of the nature of the class of judgments which make up its range. [77]

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not however, attempt to combine the contract procedure and the process of arriving at an explication of the considered moral judgments of competent judges into a coherent justificatory prodecure. See "Justice as Fairness", 193.

[77] Rawls, "Outline of a Decision Procedure for Ethics", 184. It is important to note that there are significant discrepancies between the account of a heuristic explication of considered moral judgments of a class of competent judges offered here and the description of the procedure of reflective equilibrium expressed in A Theory of Justice. In the former much more space is given to procedures for identifying the class of moral facts, and a stronger notion of confirmation is embodied in the notion of a heuristic explication of these considered moral judgments. It is only in A Theory of Justice that we find the suggestion that a justified moral theory is accomplished by "moving back and forth" between theoretical considerations and the provisional starting points of our considered moral judgments. See C. F. Delaney, "Rawls on Method", Canadian Journal of Philosophy, supplementary vol. III (1977), for an illuminating discussion on how this shift in emphasis reflects the change in conceptions of scientific method during the twenty years between publications of the two works of Rawls mentioned above.

Notice that in this passage there is no stipulation that the statements of a moral explication or theory must be widely accepted or intuitively appealing. On the heuristic approach we are searching for an underlying but as yet unknown account of the class of considered judgments of competent moral judges. That such an investigation may not reveal a theoretical explanation that we are antecedently acquainted with is amply illustrated by the empirical sciences. Many scientific explanations join relatively familiar phenomena, such as the reflection and refraction of light, to relatively unfamiliar ones, such as the behavior of electromagnetic waves. Indeed most of the explanations offered by contemporary science postulate phenomena stranger and less familiar than that which they explain.

The above points to what I believe is a basic incompatibility in A Theory of Justice between Rawls' contractarianism and the scientific approach to ethical theory building that is contained in his account of reflective equilibrium. In the original position the contracting parties are situated by conditions that draw on familiar and intuitive moral notions. However, his scientific approach demands that these conditions represent a deep theory that is acceptable only to the extent that it provides a maximally coherent and unified account of our ethical judgments at all theoretical levels. This is not to say that such an account cannot incorporate statements or principles with which we are antecedently acquainted, for all things being equal one theory is to be preferred to another to the extent that it preserves well established and familiar generalizations.[78] However, the stipulation that theoretical constructions must consist of the intuitive or the familiar can only increase the likelihood that the sought after explication will embody some of the commonly experienced judgments which for which it is meant to account. Rawls claim that his defense for the veil of ignorance draws on one of our considered moral judgment is a case in point.

None of this implies that Rawls' contractarian approach or even his principles of justice (and his other proposed ethical principles) must be abandoned. What it does entail is that the significance of the original position and the nature of the deep theory to which it is subordinate must be radically reinterpreted. If the original contract is to serve solely as a medium through which inferences from a background theory are made, then there can be no question of it embodying by fiat intuitively appealing normative presumptions. It must rather take on the characteristics of correspondence rules in the empirical sciences. Such rules are meant to link theoretical terms with observables, and thus enable directly testable statements to be deduced from theories. On a roughly coherentist model of justification such as Rawls' these rules are merely extra premises of the theory in question, having the same empirical status as its other assumptions. This means that they must stand or fall with the success of of the theory as a whole in providing a coherent and systematic account of our considered judgments at all thoeretical levels. Whether or not they represent popular moral notions is therefore irrelevant to their function.

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[78] See W. V. O. Quine, Word and Object (Cambridge, Mass.: M. I. T. Press, 1960), 20-21 on the virtues of theoretical "conservatism".

Of course the notions the original contract represents jointly constitute Rawls' deep theory, and that theory also cannot be restricted to familiar ethical doctrine of however abstract a nature. In fact, as analogous cases from the empirical sciences indicate, such a theory, if it is to be ultimate in the sense specified earlier, may well consist of wildly unfamiliar and perhaps even counterintuitive statements. We have seen that Rawls' stated deep theory does not follow this pattern, but even if this is a factor in his having violated our independence constraint his proposed ethical principles may still enjoy a degree of indirect confirmation. For if we take him at his word concerning their putative compatibility with our considered moral judgments and their joint derivability from the circumstances of the original position they are due a significant degree of verification on these scores alone.

What Rawls needs to secure them as part of a comprehensive explication of the total range of our considered considered moral judgments is to show that they can be derived from a deep theory of interpersonal moral relations that is abstract enough to remove it from suspicion of explanatory circularity. Interestingly, there is a suggestion in this direction in A Theory of Justice. In section 40 he introduces the "Kantian interpretation" of justice as fairness, which contains nothing in the way of recognizably popular ethical doctrine (at least outside of the philosophical community). Perhaps concentrated analysis of Rawls' Kantian sympathies would reveal a systematic account of his proposed principles that does not violate our independence constrant. But that is a subject for another time.[79]

At this point I will consider the two objections to the stance developed here that I mentioned earlier are suggested in some of Rawls' writings on the objectives of the moral enterprise. The first has to do with the feasibilty of a moral conception as a publicly acceptable basis for solving disputes:

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[79] It is of course open to Rawls to abandon his scientific approach to ethics and simply pursue the traditional contractarian practice of deriving an ethical theory from an original agreement embodying reasonable conditions on principles. But in this case he will have offered no significant advance on the traditional approach and therefore no good reasons for us to accept his theory if we do not find this approach convincing.

> The moral conception is to have a wide social role as part of public culture and is to enable citizens to appreciate and accept the conception of the person as free and equal. Now if it is to play this wide role, a conceptions' first principles cannot be so complex that they cannot be generally understood and followed in the more important cases. Thus, it is desirable that knowing whether these principles are satisfied, at least with reference to fundamental liberties and basic institutions, should not depend on information difficult to obtain or hard to evaluate. To incorporate these desiderata in a constructivist view, the parties [the people in the original position] are assumed to take these consideration into account and to prefer (other things equal) principles that are easy to understand and simple to apply. The gain in compliance and willing acceptance by citizens more than makes up for the rough and ready nature of the guiding framework that results and its neglect of certain distinctions and differences.[80]

The above specifically pertains to a moral conception's first principles, but we may suppose it to apply to the moral notions at work in the deep theory as well. The contention would be that a fully justified moral conception, i.e., one that maximally and coherently accounts for our considered moral judgments at all theoretical levels and which meets our independence constraint, might be of too abstract or complex a nature to gain widespread public acceptance. In contrast, the conception offered in A Theory of Justice, while failing our independence constraint, consists of intuitively appealing and widely accepted conditions on a conception of justice. Assuming that it is roughly confirmed by our considered moral judgments, such a conception has a much better chance of forming a popular means of deciding moral issues. Therfore, the argument continues, it is to be preferred to the more complicated alternative.

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[80] Rawls, "Kantian Constructivism in Moral Theory", 561.

As a first response, we will recall that a conception's being feasible cannot conclusively determine it as justified or correct. That a theory must provide the prospect of fruitful and enduring cooperation is a very weak requirement, one which is presumably met by all of the major traditional ethical conceptions. Feasibility requirements, however, could prove decisive in terms of a theory being rejected, if it could be shown that said theory could not meet various practical considerations. Oddly enough, in the present context this suggests that a thorough and rigorous explication of our moral sentiments might not be acceptable for the very reason that it would be too complicated for a public conception. The suggestion arises, I think, because of the mistaken assumption that a moral theory must be composed of familiar or intuitive notions in order to achieve public approval. That this is an unsound suggestion is illustrated again by an analogy from the empirical sciences. A thorough understanding of most comprehensive empirical theories is possessed only by a relative few who are specially educated in the appropriate fields. Yet most of us are inclined to accept their expertise in identifying correct scientific theories. Ultimately this confidence of ours in the assessments of the "experts" is likely grounded in pragmatic considerations, notably the tendency of the approved theories to make correct predictions about certain natural phenomena and consequently to provide us with ever more extensive control of our environment. But there is no reason to suppose the same would not hold for ethical theories that were researched and confirmed by the moral experts (moral scientists?). It will not do to make the somewhat intuitive reply that ethical questions are somehow more basic to everyday experience, that contrary to scientific matters moral ones are entertained by laypeople in the normal course of their lives, for it is clear that this claim is false. We do employ scientifically supported principles in our day to day affairs; it is just that these principles have been so repeatedly confirmed by experience that we tend to think of them as common sense descriptions of the way things are. A successful moral theory, one that accurately predicts our suitably "pruned and adjusted" considered moral judgments about familiar ethical situations and implies acceptable judgments concerning situations about which we formerly had no firm convictions, would likely garner the same public support. In fact, it would be patently irrational of us to refuse to believe in the veracity of an ethical theory that was suitably confirmed by experience.[81]

The suggestion that the complex deep theory represented by an appropriately abstract and general moral conception would not gain public acceptence, even if it were empirically confirmed through the auspices of a wide reflective equilibrium, then, seems misguided. Let us therefore consider another variation on the theme that pragmatic considerations might override theoretical and/or independence ones in determining a justified moral theory. The line in question is concisely characterized by a passage in the last section of A Theory of Justice in which Rawls considers a new angle concerning the appropriateness of the veil of ignorance as an informational constraint on the choice of the contractors:

> To be sure, the function of moral principles is not uniquely defined; it admits of various interpretations. We might try to choose between them by seeing which one uses the weakest set of conditions to characterize the initial situation. The difficulty with this suggestion is that while weaker conditions are preferred, other things equal, there is no weakest set; a minimum does not exist short of no conditions at all and this is of no interest. Therefore we must look for a

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[81] Of course no moral theory is likely to be so confirmed in the forseeable future, but perhaps this is because ethical enquiry has not reached the "paradigmatic stage" exemplified by emerging scientific areas of research. If we were to approach ethical questions as, at least in principle, empirically solvable, this situation might eventually be remedied (assumimg that the class of our considered moral judgments is also in principle isolatable, an assumption I am not prepared to defend).

> constrained minimum, a set of weak conditions that still enables us to construct a workable theory of justice. [583]

Rawls might here be interpreted as saying that his description of the original position is to some extent justified purely in virtue of the fact that it yields a reasonable conception of justice, i.e., one that matches our considered judgments of justice. In contrast, other possible construals of the initial situation, construals that would impose weaker conditions on the choice of the contractors, may not imply such a conception. A prime example might be the rendition of the initial situation described in "Justice as Fairness", in which there is no veil of ignorance. We have seen that this construal, like that offered in A Theory of Justice, satisfies the condition that none of the contractors receive unfair bargaining advantages. However, unlike the more recent version it does not produce a determinate solution to the choice problem represented by the circumstances of the original contractors. On this basis, Rawls might claim, the version that includes the veil is favoured. Like the other "pragmatic" suggestion we considered, this offering can be read as a challenge to the importance of our claim that Rawls has violated the independence constraint. Rawls could simply admit that the overt defences of the veil in his book fail the independence constraint and are therefore inadmissable. He could then assert that the deep theory that would remain after the offending statements were removed would suffice to back his final description of the original position. For even though the veil would not be ostensibly defended it would be justified on the pragmatic grounds suggested above. More explicitly, he could claim that the veil of ignorance version of the original position does what we want a moral explication to do, produce a reasonable and therefore justifiable conception of justice. Presumably this reasoning could be extended to apply to all of the ethical priniciples he claims are derivable from the original contract.

To begin with we may again note that the original position itself cannot provide anything in the way of justification or explication for the implied ethical principles. It serves only as a conduit for inferences from the deep theory, which theory must provide the brunt of the justification in question (apart from the principles' match with the relevant considered judgments). Therefore, if it cannot be shown that through the auspices of the original position the proposed principles are derivable from and therefore subsumable under a fully expressable background theory, no explication has been achieved. The suggested alteration to Rawls' deep theory, then, would circumvent a violation of the independence constraint, but only at the expense of denying any background justification to his ethical principles.

However, it still remains the case that if all of Rawls' ethical principles can be derived from the circumstances of the original position, these principles, and the construal of the original position itself, are lent a certain amount of credibility. For if this derivation is legitimate, it suggests that a deep theory can be found to explicate the principles and their corresponding considered moral judgments. All that is required is to find a suitable expression of that theory that legitimizes the circumstances of the original contract, and which in addition meets our independence constraint. We have already suggested that a concentrated investigation into Rawls' Kantian sympathies might provide the requisite theory. In this light the independence constraint could be viewed as an expository device rather than a damning criticism of Rawls' theory as presently stated. It merely points out that an appropriate background theory has not yet been articulated, leaving undamaged the suggestion that the success of the original position in yeilding empirically verifiable principles bodes of a forthcoming theory that is satisfactory in the relevent respects.

If Rawls' principles did match our considered moral judgments in the appropriate manner I might be moved by the above interpretation. However, now has come the time to relax the assumption, entertained thus far in this thesis, that this is the case. As we noted in chapter two it is unlikely that there is a consensus on considered judgments of justice in modern Western democracies, and this is no doubt also the case with the other major categories of moral convictions. This effectively deflates Rawls' presumed claim that his principles account for the entire range of our basic ethical intuitions. Without a presumption in favour of this claim the assertion that his description of the original position, veil of ignorance included, produces the correct or favoured ethical conceptions simply begs the question against other proposed substantive ethical theories, such as Nozicks' historical entitlement theory and the various forms of utilitarianism.

We find, therefore, that a thorough enquiry into the implications of a suitably construed independence constraint casts severe doubts as to the validity of Rawls' general moral conception. In closing I want to note one more possible objection to what has been argued in this paper that is based on Rawls' new political view of justice as fairness. In "Justice as Fairness: Political not Metaphysical", Rawls claims that not only the conception of justice elaborated in A Theory of Justice but also the general conception from which it is derived is part of the political tradition of modern constitutional democracies.[82] This suggests that the principles of justice are not derivable from a background conception or theory that draws on considered judgments from other areas of ethical enquiry. In response I would point out that the principles of justice are supposed to settle all important questions concerning the way in which basic institutions are to distribute the basic liberties and economic amenities [7-10], which questions just do constitute the realm of a political conception.[83] But if Rawls' background conception is to be more general in application than his principles of justice, thus offering independent support for them in the manner outlined in this essay, than it must generalize over other related areas of enquiry, which areas presumably must be ethical ones.[84] For this reason, I submit that the findings of this paper remain valid.

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[82] See Rawls, "Justice as Fairness :Political not Metaphysical", 225-226, 229-231, 240-245. See especially 240, where Rawls explicitly acknowledges the conception of persons as free and equal as a political conception.

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[83] See Rawls, "Justice as Fairness": Political not Metaphysical", 225-226.

[84] Since, for reasons explored in chapter one, they cannot be empirical in nature.

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